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AN ANALYSIS

OF

WILLIAMS

ON THE

LAW OF REAL PROPERTY

FOR THE USE OF STUDENTS

BY

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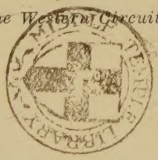

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TABLE OF PRINCIPAL ABBREVIATIONS.

A. E. A.	Administration of Estates Act.
C. A.	Conveyancing Act.
Ch. D.	Chancery Division.
C. L.	Common Law.
C. L. P. A.	Common Law Procedure Act.
c. q. t.	*cestui que trust.*
c. q. v.	*cestui que vie.*
Ct.	Court.
J. A....	Judgments Act.
L. C. A.	Land Charges Act.
L. P. A.	Law of Property Act.
L. R. A.	Land Registration Act.
L. T. A.	Land Transfer Act.
M. W. P. A....	Married Women's Property Act.
p. a. v.	*pur autre vie.*
P. R.	Personal Representatives.
R. P. A.	Real Property Act.
S. L. A.	Settled Land Act.
St. or Sts.	Statute of or Statutes of.
W. A.	Wills Act.

REAL PROPERTY.

CHAPTER I.

OF THE NATURE OF REAL ESTATE.

Property.—The word property is used as denoting (1) the *right* of ownership; (2) the things which are the *objects* of a right of ownership; (3) anything which can be assessed at a money value.

Ownership chiefly imports the rights of exclusive enjoyment and possession. It may be (1) **Absolute** where it (a) includes the rights of free enjoyment and disposition, (b) is unlimited in point of duration, (c) is not derived out of the ownership of another; (2) **Limited** where either (a), (b) or (c) is wanting.

Things are (1) **Corporeal,** *i.e.*, tangible objects; (2) **Incorporeal,** *i.e.*, mere rights, such as a right of way or the right to recover a debt.

Similarly, property considered as an aggregate of rights consists of (1) rights of ownership over tangible objects, clothed with possession; (2) bare rights unaccompanied by possession.

Property in Land and Goods.—By English law goods may be the objects of absolute ownership, but land is merely the object of *tenure;* in land there cannot be absolute ownership except in the Crown, of whom all land is held, either immediately or through some intermediate (*mesne*) lord.

A subject can have but an **estate** (*a*) in land, which is, how-

(*a*) Estate (*status*) first denoted a man's personal condition in law, then the nature, and then the extent, of his interest in land.

ever, *property*, since he has the rights of exclusive enjoyment and possession of his holding. The greatest estate is an estate in *fee simple*, to which are attached the rights of free enjoyment and disposition, making it nearly equivalent to absolute ownership.

The distinction between land and goods is due to (1) the fact that during the three centuries after the Norman Conquest land was the principal form of capital, and services, now paid for in money, were then requited by grants of a holding of land. From the tenants in chief who held land by military services to the King, to the peasant who held by field labour on his lord's demesne, the whole social organisation was based on landholding for services; (2) the physical superiority of land, its permanence and indestructibility, so that a person wrongfully ejected can always be restored to the land itself.

The principle of feudal tenure was definitely established in England after the Conquest, when William I., in granting English lands to his followers, or regranting them to their former owners, did so not by way of absolute gift, but subject to the obligations of fidelity and service to the King, in which, if the grantees failed, their holdings would be forfeited. This system spread quickly downwards, for the immediate tenants of the King made grants of land to their followers, as under-tenants, upon similar conditions.

Land being thus the object of tenure, a parcel of land in a person's occupation with its appurtenant rights was known as a *tenement*. Not every occupier, however, was a feudal tenant; the three most important classes of tenancies were (1) **Freeholding,** held of the King or a mesne lord by free—usually military—services; (2) **Villenage,** where land was held of the freeholder by services chiefly of field labour regulated by custom, and often servile in character; (3) **Leasehold,** *i.e.*, land held under contract with the freeholder for possession for a certain *term* of years.

The incidents of these three holdings varied in respect of (A) the protection given to the possession of the tenant; (B) the devolution of the holding upon death.

(A) Only the freeholder was fully protected. He alone could

bring an action in the King's Court to recover his holding from anyone who had ejected him or was in possession of it. The villein held merely at the will and on behalf of his lord, and if his customary rights were infringed he could only appeal to his lord's court for redress. The tenant for years was considered merely the bailiff of the freeholder. If ejected, he originally had no remedy unless he held under a covenant with his landlord. In that case he might bring an action of covenant against the landlord if ejected by him or anyone claiming by superior title. Later he was given special actions for damages against any person who dispossessed him, and *sub* Edw. IV. he could also recover possession of his holding.

(B) The estate of the freeholder was usually hereditary, so that it passed to and was recoverable by the heir, and could not originally be devised away from him. In villenage the descent of the land depended upon custom. The interest of a tenant for a term of years was reckoned among his chattels at his death.

[Chattels, being absolute property, were applied first in payment of debts. If any surplus remained, one third might be disposed of by will if a wife *and* child survived, one half if a wife *or* child, otherwise the whole.

The will was carried out by the executors of the deceased, who at first took only the surplus, the heir paying the debts; but subsequently took the whole and paid the debts. If a man died *intestate*, the administration of his goods was committed to the ecclesiastical courts and performed after 31 *Edw. III. c.* 11 by an administrator chosen from the next friends of the deceased.]

A freeholding being then the only kind of property in land which was fully recognised, the word "tenement" was used to denote a free tenement only, and the word "lands" or "lands and tenements" as denoting freeholds. Further, as anything which could descend to the heir was called a *hereditament*, lands and tenements were known as hereditaments.

Real and Personal Property.—The terms "real" and "personal" were at first applied to actions. Real actions were those in which restitution of the very thing claimed might be enforced by execution issuing *in rem*. Personal actions were those brought to obtain pecuniary compensation (damages) for the violation of a right. *Sub* Hen. III. it was established that specific restitution could be claimed only in actions for the recovery of immoveables. In civil proceedings for moveables the defendant could absolve

himself by payment of their value (*b*), and such actions were therefore classed as personal. Actions were thus said to *sound* in the *realty* or in the *personalty* according as the relief was specific recovery or damages. Hence the word *realty* was used to denote things specifically recoverable, *i.e.*, lands and tenements (also called "things real"), while moveable goods, debts, &c. were termed things personal.

Freeholds being, however, originally the only lands specifically recoverable, the word "realty" was used as denoting freehold. Interests in land that were reckoned as chattels were later distinguished as *chattels real*, the name of *chattels personal* being given to moveable goods.

As freeholds passed to the heir but chattels to the executor, the notion of descent to the heir became associated with realty, and only things inheritable as well as specifically recoverable—*i.e.*, *real hereditaments*—were classed as real estate. Chattels real, though specifically recoverable, were considered personal estate as they passed to the executor.

The terms *real* and *personal estate* did not come into general use much before Charles II. By that time the development of modern commerce and capital had begun. Tenure had lost its importance as money payments were adopted in lieu of services, and the freeholder enjoyed absolute ownership in all but form.

Military tenure was finally abolished by 12 *Car. II. c.* 24. Villenage had become extinct, giving rise to the customary tenure of *copyhold*, and, since the copyholder might maintain an action for the recovery of his holding, and might also have an estate inheritable by his customary heir, copyhold was included in real estate. Leaseholds, however, never ranked as real estate.

It must here be noticed that the C. L. rule of descent to the heir, which was characteristic of real estate, was modified by the Land Transfer Act, 1897. By this Act real estate, notwithstanding any testamentary disposition, was made to devolve on the personal representatives of the deceased tenant like a chattel real and might be sold to satisfy his debts. But, subject to the provisions of the Act, the *beneficial interest* still passed

(*b*) Since the C. L. Procedure Act, 1854, it has been possible to enforce the specific restitution of chattels.

to the heir. Under the new scheme of interests in land descent to the heir is abolished (*bb*).

It may also be noted that in modern times personal estate, as well as real, came to include many forms of property which were formerly unknown, such as stock in the public funds, and shares in joint stock companies.

CHAPTER II.

OF THE CLASSIFICATION OF TENURES.

Free Tenure.—A freeholder who is possessed of land (*c*) in fee simple is said to be *seised thereof in his demesne as of fee* (*d*).

The freeholder might be (a) a tenant *in capite* holding by a grant immediately from the King; (b) a sub-tenant to whom a tenant *in capite* had made a similar grant by *subinfeudation*, becoming thus a *mesne lord* between the King and the sub-tenant. The mesne lord was no longer seised *in his demesne* of the land which he had so granted but *in service*.

The feudal lord was mainly bound to warrant his tenant's title to the land bestowed, and to give him lands of equal value if he was ejected by anyone showing superior title. The tenant was bound to fealty and to perform the services stipulated for.

The Classification of Tenures.—Henry II. reorganised and appointed permanent judges of the King's Court, and by the *assize of novel disseisin* gave to all freeholders wrongfully disseised a remedy in that Court. The King's Court was thus thrown open as a Court of first instance to landholders and the various kinds of holding were submitted to the test of judge-made law.

While services were a matter of agreement, and so might be of innumerable kinds, a classification of tenures could hardly be

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(*bb*) *Post*, p. 11.

(*c*) The ownership of land carries with it everything both above and below the surface. *Cujus est solum ejus est usque ad cœlum et usque ad inferos.*

(*d*) Moreover (*ante*, p. 3) the early law did not recognise the possession of a termor. And to this day the freeholder is seised in his demesne of land occupied by his leasehold tenants.

complete. But the statute **Quia Emptores** abolished subinfeudation and permitted every free tenant in fee simple to sell his whole holding or any part thereof, so that the purchaser should hold not of the vendor, but of the vendor's lord, and subject to the services upon which the vendor had held. Henceforth a tenant in fee simple could not make himself a mesne lord and the existing tenures became stereotyped and were eventually classified as follows—

(A) **Free** tenure, which was either spiritual or lay, the two chief forms of the latter being knight's service and socage; (B) **Villenage,** which was either pure or privileged.

The chief **incidents of tenure by knight's service** were (1) **the obligations of the tenant,** of which the chief were—(i.) to perform military service for his lord. This, after Henry II., was in the case of sub-tenants usually commuted for a money payment (*scutage*). Both scutage and the obligation of military service became obsolete after Richard II.; (ii.) to render pecuniary aids to ransom the lord, to make his eldest son a knight, and to marry his eldest daughter; (iii.) to do homage upon entering his estate and to take the oath of fealty; (iv.) to pay (if he was of full age) a fine (*relief*) on succeeding to his ancestor's estate; (v.) to do *suit of court*, that is, to attend and assist at the business of the court baron, *i.e.*, the lord's court, in which the freeholders of the manor were both suitors and judges. The king's tenants *in capite* were also liable to other exactions.

(2) **The rights of the lord**—the chief being—(i.) to have the *wardship* of infant heirs without accounting for profits, and to dispose of them in marriage to his own greatest advantage; (ii.) to have the lands again as his *escheat* on failure of the tenant's heirs or on his attainder. On attainder the lands were first held by the Crown for a year and a day, except in case of high treason, when they were forfeited absolutely to the Crown.

Grand Serjeanty was almost equivalent to knight's service, and was subject to the burdens of wardship and marriage. From the time of Littleton it was a holding by personal services to the King, such as carrying his banner.

Free Socage was originally the tenure of the *liberi sochemanni*,

a class of freeholders dating from before the Norman Conquest but rarely found at the time of the Domesday survey outside the north-eastern counties. Afterwards the term was extended to the tenure of freeholders holding by rent in money and services, which were generally agricultural but fixed, and less onerous than those of villeins, and which were subsequently commuted for money payments. A tenant in socage was bound to take an oath of fealty, and was liable to render the aids *pour fille marier* and *pour faire fils chevalier*. Suit of court and escheat were also incident to socage and a relief of one year's rent on succession. But the right to the **wardship and marriage** of an infant heir did *not* devolve upon the lord but upon the nearest relative to whom the inheritance could *not* descend, who, by 52 *Hen. III. c.* 17, was accountable to the heir.

The term socage was extended later to include all tenure by certain services other than knight service, and, particularly, petty serjeanty and burgage.

Petty Serjeanty was a tenure by some service of small value, as where lands were held by yielding yearly a sword or other small implement of war.

Burgage was the tenure by which the burgesses in cities and boroughs held their houses, usually at money rents.

Frankalmoign.—This tenure arose when land was given to an ecclesiastical corporation to be held by them and their successors by divine services for the soul of the grantor and his heirs. No temporal service was required of them, and, as a corporation never dies, no escheat was possible. Hence land given to any corporation was said to be in *mortmain*.

Free Tenure in Modern Times.—Scutage, military service, homage and fealty rapidly became obsolete, but the rights of wardship and marriage and the exactions to which heirs of tenants *in capite* were subject were enforced until 1645, when they were abolished. And by 12 *Car. II. c.* 24, all estates of inheritance except copyhold and frankalmoign were turned into free and common socage and relieved from all the charges of knight's service.

The chief **incidents of modern socage tenure** were (i.) a small *quit-rent, i.e.*, a rent by which the tenant was quit of all

services (*e*); (ii.) a relief of one year's quit-rent payable by the heir (*f*); (iii.) suit of court—in case of estates in fee simple held of any manor still existing; (iv.) escheat on failure of heirs from *natural* causes, all attainder, forfeiture, or escheat upon judgment for treason or felony having been abolished by the Forfeiture Act, 1870. In case of escheat the lands in modern times have passed to the Crown unless there was a mesne lord who could show that the estate so terminated was originally granted before the *Quia Emptores*, and was held of him and not of the Crown.

Grand Serjeanty still remained, deprived of the burdens of knight's service but retaining its honorary services. Petty serjeanty being practically socage, was unaffected by the 12 *Car. II. c.* 24.

Other existing varieties of socage tenure were—

(1) **Gavelkind**—prevailing chiefly in Kent—in which (i.) if a tenant in fee dies intestate the land descended to all males in equal degree in equal shares; (ii.) a tenant in fee could, at the age of 15, dispose of his estate by feoffment; (iii.) no escheat existed on judgment of death for felony; (iv.) particular rules governed dower and curtesy.

(2) **Borough English,** owing its origin to *burgage* (*ante*, p. 7), in which the estate descended to the *youngest* son.

CHAPTER III.

OF ESTATES IN LAND AND OF THE DIFFERENCE BEWEEN LEGAL AND EQUITABLE ESTATES.

Freehold Estates, whether granted to tenants *in capite* or by subinfeudation, were usually estates of inheritance, but might be estates given to the grantee for his life, or for the life of some other person or for some other period of *uncertain* duration. An estate of inheritance might be either (i.) a *fee simple*, *i.e.*, given to the grantee and his *heirs* generally; or (ii.) a *fee simple conditional*, *i.e.*, given to the grantee and the *heirs of his body*

(*e*) Extinguished after 1925 by section 138 of the L. P. A., 1922.
(*f*) All liability to pay reliefs must end by 1936 (L. P. A., 1922, s. 138).

either generally or by a particular wife. From the fee simple conditional there arose, as a result of the statute *De Donis Conditionalibus* (13 *Edw. I. c.* 1), the *estate tail* (*g*).

Copyholds similarly might be held for various estates, but, as the statute De Donis applied only to freeholds, an estate tail in copyholds was possible only by virtue of a special custom (*h*).

Leaseholds, being personal property and the subject of absolute ownership, do not admit of estates. They may be granted for any fixed and *certain* period of time and, in point of dominion, there is very little difference between a term of five or six thousand years free of rent and an estate in fee simple.

Equitable Estates in Land arose from the practice of men transferring their lands to others in trust, to be disposed of according to the directions given by the donor. This might be done either for fraudulent purposes—*e.g.*, to defeat creditors—or for purposes which could not be carried out by ordinary legal methods—*e.g.*, a gift to a friend on trust that he should deal with it according to the directions given by the last will of the donor, the intent being in this case that the donor should have the use of the land during his life.

By Rich. II., it became a common practice for men to enfeoff several others jointly, or others jointly with themselves, to the intent that the feoffees should dispose of the land according to the will of the feoffor, and hold it for his use. This was often done to escape the burdens of feudal tenure (*i*). At first the feoffees plighted their faith to carry out the wishes of the feoffor, as a suit for breach of faith could then be brought in the ecclesiastical courts. From Hen. II., however, such suits were in general prohibited, and, *sub* Rich. II., relief against breach of trust was sought from the Chancellor.

Under Edw. IV., the nature of a *use* was settled. A *cestui que use*—*i.e.*, a person to whose use land was held—had no right in law to the land, but only the right to sue the feoffee in trust personally in Chancery. He could also sue the heirs of the feoffee, or anyone who took the land from the feoffee with notice

(*g*) *Post*, p. 24.

(*h*) *Post*, p. 112.

(*i*) The right of survivorship of the joint tenants preventing the accrual of the lord's right to relief, wardship and marriage, &c. (*ante*, p. 6).

of the trust, but not an assignee for valuable consideration without notice. In case of such an assignment he might, however, recover damages from the feoffee for his breach of trust.

The feoffee was bound in Equity to allow the *cestui que use* to have the profits of the land, to maintain actions for its protection and recovery, and to *execute the estate—i.e.*, to dispose of the land according to the directions of the *cestui que use*.

At *law* the *cestui que use* was considered to have no *estate* in the land. In *equity*, he was considered to have the same estate as he would have had in law if the estate had been executed. Hence there might be in the same land two estates—the legal estate of the feoffee to uses and the equitable estate of the *cestui que use*.

The Statute of Uses.—By 27 *Hen. VIII. c.* 10, it was enacted that if one person (A.) stood *seised* of any lands or other hereditaments to the *use, trust, or confidence* of another person (B.), in such a case B. should be deemed in seisin and possession of the land for the same estate as he had in the use. The Statute *executed the use* and gave B. the same estate and possession at law as if the land had been in fact conveyed to him. Thus, if land was conveyed to A. in fee simple to the use of B. and his heirs, the Statute at once gave B. a fee simple in possession.

Trusts after the Statute of Uses.—The Statute did not apply to *special* trusts, *i.e.*, where B., the feoffee, had any active duty laid on him, as to sell land; nor did it apply, except where the feoffee to uses was *seised* of a *freehold* interest.

But in case of freeholds the Chancery jurisdiction was for a time ousted by the turning of the use into a legal estate. After about a century, however, the doctrine was established in the C. L. Courts that there could be *no use upon a use, e.g.*, if land was conveyed unto and to the use of A. and his heirs to the use of B. and his heirs, the second use had no effect at law as being repugnant to the first, and the legal estate remained annexed to the first use.

Equity, however, dealt with the legal owner in the same way, whether he became legal owner at C. L. or under the Statute, and in such a case considered that A. held in trust for B. Thus equitable estates were re-established.

In regulating equitable estates and interests, the Court of Chancery followed mainly the principles applicable to legal estates and interests, so that trusts of real or personal property conferred on the *cestui que trust* an interest in the nature of realty and personalty, and estates of various kinds might exist in equitable real estate as in legal real estate. Thus, one person might be entitled to a parcel of land in law and another in equity. And, in consequence of the doctrine that a person taking a legal estate with notice of trusts affecting it would be bound by those trusts, it was necessary for a purchaser or mortgagee of property with notice, actual or constructive, of any trust affecting it, to satisfy himself that the transaction was within the powers of the trustees.

The New Scheme of Interests in Land.—This scheme has been created by the following Acts:—

The Law of Property Act, 1922.
The Law of Property (Amendment) Act, 1924, and the Consolidation Acts of 1925, namely:—
The Law of Property Act, 1925.
The Settled Land Act, 1925.
The Trustee Act, 1925.
The Administration of Estates Act, 1925.
The Land Charges Act, 1925.
The Land Registration Act, 1925.
The Universities and College Estates Act, 1925.

By these Acts the following changes were made:—

1. Descent to the heir and all existing rules of descent, whether operating by general law or by custom, are abolished as regards both the real and personal estate of any person dying after 1925, and on the death of a person intestate after that year the whole of his property is held by his P. R. on trust for sale and for distribution according to new rules applicable *both to realty and personalty*, thus removing the former essential distinction between realty and personalty, arising out of the devolution of the former to the heir and the latter to the next-of-kin (*k*).

(*k*) A. E. A., 1925, ss. 33 and 45-49. A further distinction is removed in that after 1925 personal property may be entailed (L. P. A., 1925, s. 120).

2. As from January 1, 1926, there are only two forms of tenure, namely, freehold and leasehold. Copyhold is abolished and every parcel of copyhold land is automatically converted into freehold (*l*). The honorary incidents of grand and petty serjeanty are preserved but the land to which they attach is to be regarded as freehold (*m*).

3. As from the same date, escheat for want of heirs is abolished (*n*) and any such feudal incidents as rent, reliefs, or heriots to which any freehold land has been liable will be extinguished at the latest at the end of 1935 (*o*).

4. The Statute of Uses is repealed (*p*), except as regards its operation on dealings taking effect before 1926 (*q*).

5. As from January 1, 1926, the only estates in land which can subsist or be conveyed or created *at law* are: (i.) an estate in fee simple absolute in possession, and (ii.) a term of years absolute. Such estates are *legal estates* and the owner is called an *estate owner* (*r*).

Similarly, the only interests or charges in or over land capable of subsisting or being conveyed or created *at law* are: (i.) an easement, right or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute; (ii.) a rentcharge in possession issuing out of or charged on land being either perpetual or for a term of years absolute; (iii.) a charge by way of legal mortgage; (iv.) land tax, tithe rentcharge, and any other similar charge on land which is not created by an instrument; (v.) rights of entry exercisable over or in respect of a term of years absolute, or annexed to a legal rentcharge (*s*).

All other estates and interests in land take effect as *equitable interests* and, if subsisting at law before January 1, 1926, are on that date automatically converted into equitable interests (*t*).

Equitable Interests at the Present Time.—An equitable or trust estate is the interest of one *in trust* for whom another holds lands as legal owner. The holder is the *trustee*, the person

(*l*) L. P. A., 1922, s. 128.
(*m*) *Id.*, s. 138.
(*n*) A. E. A., 1925, s. 45.
(*o*) L. P. A., 1925, s. 138.
(*p*) L. P. A., 1922, s. 1.
(*q*) L. P. A., 1925, s. 1.
(*r*) *Ibid.*
(*s*) *Ibid.*
(*t*) *Ibid.*

beneficially entitled is the *cestui que trust*, and the nature of the trust estate is the same as that of a use before the Statute.

In *special* trusts it is the duty of the trustee to perform exactly the wishes of the person creating the trust.

In *simple* trusts, where there are no active duties, the trustee is bound to maintain actions for the defence of the land, to allow the *c. q. t.* to have possession and take the profits, and if the trust is for him in fee simple, to convey the legal estate to him at his desire.

Strictly speaking, a trust estate is still but a right enforceable against the trustee personally and all who take from him, except, as a general rule, *bonâ fide* purchasers for value without notice of the trust. But this rule has been modified by the recent Property Acts. In particular, the **Law of Property Act, 1925** (*u*), provides that a conveyance of a legal estate to a purchaser for money or money's worth shall overreach any equitable interest or power affecting that estate, *whether or not the purchaser has notice thereof,* if the conveyance is made: (i.) under the Settled Land Act, 1925; (ii.) by trustees for sale; (iii.) by a mortgagee or P. R. in the exercise of his paramount powers; (iv.) under an order of the Court—provided that, in all four cases, the equitable interest or power is capable of being overreached and also that any capital money is paid, in the first two cases, to at least two trustees or a trust corporation (*x*); in the third case, to the mortgagee or P. R.; and, in the fourth case, into, or in accordance with the order of, the Court. Also, where land is *not* subject to a trust for sale or settlement, the estate owner may transfer his estate to trustees upon trust for sale, and any conveyance made by such trustees after 1925 will overreach any equitable interests and powers capable of being overreached, provided that the trustees are either (i.) two or more individuals approved or appointed by the Court or their successors, or (ii.) a trust corporation. Again, the **Settled Land Act, 1925** (*y*), provides that, where a person of full age is bene-

(*u*) Section 2.

(*x*) *I.e.*, the Public Trustee or a corporation appointed by the Court to be a trustee or entitled under the Public Trustee Act, 1906, to act as custodian trustee; L. P. A., 1925, s. 205.

(*y*) Section 21.

ficially entitled in possession to a legal estate subject to equitable interests or powers, he may, for the purpose of overreaching them, make the land settled land.

But the following cannot be overreached in the foregoing methods: (i.) any equitable interest protected by deposit of documents relating to the legal estate; (ii.) restrictive covenants; (iii.) equitable easements; (iv.) estate contracts; (v.) equitable interests protected by registration under the Land Charges Act, 1925, other than life annuities and limited owners' charges. And, as regards the following interests created before 1926—namely, (i.) the benefit of a restrictive covenant; (ii.) an equitable easement; (iii.) the interest under a puisne mortgage within the meaning of the Land Charges Act, 1925, unless and until acquired under a conveyance after 1925; (iv.) the benefit of an estate contract unless and until acquired under a conveyance after 1925—a purchaser of a legal estate only takes subject thereto if he has notice thereof, and they have not been overreached in the foregoing ways. We thus see that a trust estate is not a true right of ownership, but is properly a mere obligation incumbent on the legal owner of land and enforceable against some, but not all, of those who succeed to his estate. In equity, however, the *c. q. t.* is the owner of the land as against all persons bound by the trust, and his beneficial interest is treated as an estate in the land.

Trusts are (a)—**express**—created by act of parties—(i.) by the conveyance of lands to A. in trust for B.; (ii.) by A. declaring he holds his own lands in trust for B. But a mere voluntary *promise* to transfer property without a declaration of trust is not enforceable in equity (*z*).

(b) **Implied**—created by operation of law—*e.g.*, (i.) where A. conveys property on trusts which fail; (ii.) where A. on purchasing property takes a conveyance in the name of B. and there is nothing to show he intended B. to benefit; (iii.) where A., being trustee for B., uses his position to obtain some benefit for himself; (iv.) where A. has contracted to sell land to B. (*a*).

(*z*) *Richards* v. *Delbridge*, L. R. 18 Eq. 11.

(*a*) "The moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold" (*Lysaght* v. *Edwards*,

In cases (i.) and (ii.) there is a **resulting** trust in favour of A.; in (iii.) and (iv.) A. is a **constructive** trustee for B.

In making declarations of trust, if the intent is clear it is not always necessary to use for the creation of *equitable* estates the same technical expressions as are required to limit estates at law. But, in the case of *executed* trusts limitations of equitable estates must be construed in the same way as similar limitations of legal estates (*b*). And an entailed interest in land (which now must be equitable) can now be created, whether by will or deed, only by the use of the words "heirs of the body" or "in tail" (*c*). And if technical legal terms are employed, they are construed in their strict legal sense except in **executory** trusts, *i.e.*, trusts in which there is merely an expression of general intent which must be carried out by some further instrument. In such cases words will not be given their strict legal meanings if to do so would defeat the intent of the person creating the trust.

A similar regard to intention is shown in the case of implied trusts. Thus immediately a contract for the purchase of freehold is complete, the purchaser gets at once a corresponding equitable estate which devolves on his personal representatives if he dies intestate before conveyance.

So also an agreement for a lease for years gives the lessee an estate in equity during the term. Similarly if land be directed to be sold and the proceeds to be invested in other land to be settled on certain persons, such persons are in equity deemed to be in possession of the estates which they are intended to have. In all these cases the principle is, that Equity considers as done that which ought to be done (*d*).

An equitable tenant in fee has the same **right of enjoyment** as a legal tenant.

[Note that a *legal* tenant in fee simple may in equity be subject to restrictions on the use of his land imposed by his own agreement or that of his

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2 Ch. D. at p. 506). A contract to convey a legal estate must now be registered as a land charge.

(*b*) *Re Bostock's Settlement*, [1921] 2 Ch. 469.

(*c*) L. P. A., 1925, s. 130.

(*d*) *Re Cleveland's Settled Estates*, [1893] 3 Ch. 244; *Re Gosselin*, [1906] 1 Ch. 120.

predecessors for the benefit of some other land, and such restrictions may be enforced by injunction against him, his successors and assigns, except assigns for value without notice of the restriction (*e*).]

An equitable owner has a free **power of disposition** *inter vivos* or by will commensurate with his estate, and trust estates are, equally with legal estates, liable to involuntary alienation for debt.

Creation and Transfer of Trusts.—Except in the case of entailed interests (*f*), trusts may be created and transferred without any particular ceremony or form of words. But by the **Law of Property Act, 1925** (*g*), all declarations of trusts in *lands* must be evidenced by some writing signed by the settlor or his last will; the Act also provides that all *assignments* of *any* trusts must be in writing signed by the party assigning or by his last will; the creation and operation of resulting, implied and constructive trusts are exempted from this statute.

Devolution.—Under the **Administration of Estates Act, 1925** (*h*), equitable estates in fee simple devolve like legal estates on the P. R. of a deceased *c. q. t.* and are held by them on trust for sale. Before 1884 there was no escheat on failure of the heirs of the *c. q. t.*, but the trustee held in his own right. By the Intestates' Estates Act, 1884, the law of escheat was made to apply just as to legal estates, but escheat for want of heirs is now abolished (*i*).

Trustees being invariably made joint tenants, on death of one the estate in any land subject to the trust vests in the survivors; on the death of a sole surviving trustee it vests in his P. R. (*k*); if there is no P. R. or it is uncertain who is the P. R. the Court may make a *vesting order*, vesting it in such person and for such estate or interest as it may direct (*l*).

(*e*) See *Tulk* v. *Moxhay*, 2 Ph. 774; *London and South Western Ry.* v. *Gomm*, 20 Ch. D. 562; *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; *Formby* v. *Barker*, [1903] 2 Ch. 539; *Elliston* v. *Reacher*, [1908] 2 Ch. 376, 665; *London County Council* v. *Allen*, [1914] 3 K. B. 642. This doctrine does not, however, extend to covenants imposing any active duty as to repair or lay out money on land (*Austerberry* v. *Oldham*, 29 Ch. D. 570).

(*f*) *Ante*, p. 15.

(*g*) Section 53 (re-enacting sections 7, 8, 9 of the Statute of Frauds).

(*h*) Section 1 (re-enacting Part I. of the L. T. A., 1897).

(*i*) *Ante*, p. 12.

(*k*) A. E. A., 1925, ss. 1, 3.

(*l*) Trustee Act, 1925, s. 44.

The Appointment of New Trustees could formerly be made only with the concurrence of the *c. q. t.*, being all *sui juris*, or by the authority of the Court of Chancery, or under an express power contained in the settlement. But now, by the **Trustee Act, 1925** (*m*), when a trustee is dead, or remains out of the U. K. for over twelve months, or desires to be discharged, or refuses to act or is unfit to act or incapable of acting, or is an infant, then the persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee, or the P. R. of the last surviving or continuing trustee, may, by writing, appoint one or more persons (whether or not being the persons exercising the power) to be trustees. Every new trustee so appointed has at once the same powers as an original trustee. Subject to provisions for preventing the number of trustees from exceeding four the number of trustees may be increased on a new appointment and separate trustees may be appointed for different parts of the trust property. It is not obligatory to appoint more than one trustee where only one was originally appointed or to fill up the original number where more than two were originally appointed; but except where only one was originally appointed and a sole trustee when appointed will be able to give valid receipts for capital money, a trustee will not be discharged unless there will be either a trust corporation or two individuals to perform the trust. The Act also gives power (*n*) to appoint additional trustees even where no vacancy has occurred, and provides that an additional trustee or trustees may be appointed by the person nominated by the instrument (if any) creating the trust, or, if there is no such person, or no such person able and willing to act, by the trustee or trustees for the time being. This power can be exercised only where a sole trustee, other than a trust corporation, is or has been originally appointed, or where there are not more than three trustees, none being a trust corporation.

(*m*) Sections 36, 37, replacing Trustee Act, 1893, s. 11. Where a trustee has been removed under a power in the trust instrument a new trustee or trustees may be appointed as if he were dead.

(*n*) Section 36.

Retirement.—Formerly a trustee could retire only by consent of all the *c. q. t.* being all *sui juris*, or by the authority of the Court or by the appointment under an express or statutory power of a new trustee. But by the Trustee Act, 1925 (*o*), a trustee may, without appointment of a new trustee, retire by a *declaration by deed* of his wish to retire and *consent by deed* of his co-trustees (*p*) and any other person empowered to appoint trustees, *provided that* after his discharge there will be either a trust corporation or two individuals to perform the trust and that this method of retiring is not negatived by the instrument (if any) creating the trust. On a fresh appointment a conveyance to the new trustees was formerly necessary, but now by the same Act, replacing similar provisions of the Trustee Act, 1893, the transfer may, *with some exceptions*, be effected by a *vesting declaration* contained in a *deed* executed after 1881 by which a new trustee is appointed or a trustee is discharged, and made, in the first case by the appointor, and, in the second case, by the retiring and continuing trustees and any other person with power to appoint trustees; if, in either case, a deed executed after 1925 does not contain such a declaration, it will nevertheless, subject to any express contrary provision therein, be deemed to contain it. Where the concurrence of a trustee cannot be obtained, *e.g.*, if he is a lunatic, infant, or cannot be found, a *vesting order* is made by the Chancery Division; a similar order may be made where new trustees are appointed by the Court (*q*).

By the **Judicial Trustee Act, 1906,** the Court may, on the application of a person creating a trust, or of a trustee or *c. q. t.*, appoint a trustee under the control of the Court to act either as sole trustee or jointly with other trustees.

The **Public Trustee Act, 1906,** created a public trustee. He may act either alone or jointly with any private trustee or trustees. He may be appointed to be an original or a new or an additional trustee unless the trust instrument contains a direction to the contrary, in which case he may nevertheless be

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(*o*) Section 39, replacing Trustee Act, 1893, s. 11.

(*p*) Where the Public Trustee has been appointed as trustee such consent is unnecessary (Public Trustee Act, 1906, s. 5 (2), see further *infra*).

(*q*) Trustee Act, 1925, ss. 44-56.

appointed by the Court. He may be appointed custodian trustee, the trust property being transferred to him as if he were sole trustee, but its management remaining vested in the other trustees. He may also be appointed Judicial Trustee.

CHAPTER IV.

OF AN ESTATE IN FEE SIMPLE.

THE terms *corporeal* and *incorporeal* (*a*) are particularly applicable to hereditaments, corporeal hereditaments, the land in the freeholder's possession, being contrasted with incorporeal hereditaments, such as a reversion in fee or a right of way, which are merely rights to or over land in another's possession. The former were at C. L. alienable by **feoffment,** coupled with **livery of seisin**, *i.e.*, formal delivery of possession. The latter, if transferred with land to which they appertained, passed by feoffment of the land without express mention; but, if transferred alone, required for their transfer a *deed* of grant. Hence corporeal hereditaments were said to lie in *livery*, but incorporeal in grant.

Freehold estates are either estates of inheritance (fee simple, fee tail) or estates for some definite period of *uncertain* duration (life estates, *pur autre vie* estates and estates given until the happening of some event (*b*)). Estates less than freehold arise where land is held for a *certain* term, or at the will of the donor or on sufferance.

The essential quality of ownership belongs to all freehold estates, every freeholder, whether in fee simple, fee tail, for life or otherwise, having the right to maintain or recover possession against the whole world.

An **estate in fee simple** which now is one of the only two corporeal interests in land which can exist as legal estates (*ante*,

(*a*) *Ante*, p. 1.

(*b*) *Ante*, p. 8. Since descent to the heir is now abolished (*ante*, p. 11) it may be technically incorrect to speak of "hereditaments" or (except in the case of an entailed interest in freehold land) of freeholds "of inheritance." In practice, however, these terms will probably continue to be used of estates which before 1926 descended to the heir.

p. 12) is the most absolute property which a subject can have in land and, except in form, is the equivalent of absolute ownership, carrying with it the right of free disposition and free enjoyment; these advantages were, however, gained gradually.

Right of alienation during life.—Originally the feudal system did not as a rule permit alienation, which was considered inconsistent with the rights of (A) the heir (a grant of a fee to A. and his heirs being construed as conferring a separate and independent interest upon the heirs) and (B) the lord (who retained rights over the land by virtue of the services due, which he could enforce by distress and who had also the right of escheat). Consequently a tenant could originally alienate land only by subinfeudation, and even then only with the consent of his own heir and of the lord.

(A) **Right to alienate as against the heir.**—*Sub* Hen. II. a freeholder might, in certain cases, grant away *part* of his land; he could not, however, by alienation entirely disinherit an heir of his body, but only collateral heirs. *Sub* Hen. III., however, even a son might be wholly disinherited, and it was held that on a gift of land to A. and his heirs the heir acquired nothing by *purchase*, *i.e.*, took no immediate interest or estate, but acquired merely the expectation or possibility of inheritance. At the present time the heir has not even this expectation (*c*).

(B) **Right to alienate as against the lord.**—*Sub* Hen. III. it was held that a tenant might, even without consent of his lord, absolve himself from his feudal obligation by disposing of his *whole* tenement to another to hold of his lord. But a part of the tenement could be alienated only by consent of the lord or by subinfeudation, which deprived the lord of the rights of wardship and marriage in respect of infant heirs of the subtenants. With regard to escheat, a tenant could not at first alienate so as to bar the claim of the lord to have the land, on failure of his heirs, unless the grant contained words expressly conferring on the tenant the power of alienation. But *sub* Edw. I. it was held that alienation in fee by a tenant holding to him and his heirs would deprive the lord of his escheat on failure of the tenant's heirs. Finally, by the *Quia Emptores*,

(*c*) *Ante*, p. 11.

the right to alienate all or any part of a holding was established (*d*). The statute did not, however, apply to tenants *in capite*, who did not acquire liberty of alienation until a later date.

The power of alienating lands by will was not generally obtained until much later than this statute (*e*). At present, however, every tenant in fee simple fully enjoys the right of alienating his lands by will. But under the **Administration of Estates Act, 1925** (which substantially preserves Part I. of the Land Transfer Act, 1897), any real estate to which a deceased person was entitled for an interest not ceasing on his death will, on his death, notwithstanding any testamentary disposition thereof, devolve on his P. R. as a chattel real and may be sold by them (*f*).

Exceptions to the ordinary right of alienation still exist in the case of (i.) infants and other persons subject to incapacity; (ii.) alienation into mortmain otherwise than by royal licence or by statute (*g*); (iii.) alienations for charitable purposes.

By the *Mortmain Act*, 1888, replacing earlier Acts, every assurance of any hereditaments for charitable uses is void unless made in accordance with the provisions of the Act (*h*). This Act prohibited the gift *by will* to a charity of any interest in land. But by the amending Act of 1891 land may be assured by will for a charity, but, except in certain specified cases, it must be sold within one year from the testator's death.

Under 27 *Eliz. c.* 4, which avoided conveyances made *with*

(*d*) *Ante*, p. 6.

(*e*) *Post*, p. 58.

(*f*) *Post*, p. 54.

(*g*) As to (i) and (ii) see *post*, Chap. XIII.

(*h*) These provisions, as modified by section 29 of the Settled Land Act, 1925, are as follows:—

The assurance must be (i) by deed; (ii) executed twelve months before death [except in case of sales for full value]; (iii) sent to the Charity Commissioners within six months after execution for the purpose of being recorded in their books, and enrolled in the Central Office of the Supreme Court within six months after execution; and (iv) must take effect in possession immediately; and (v) must, as a rule, be without any provision for the benefit of the assurer or his successors (s. 3). Assurances of personal estate to a charity for the purchase of land are subject to similar restrictions, but if personalty be so directed to be laid out by *will*, the charity may keep the gift and disregard the condition (1888, s. 4; 1891).

intent to defraud subsequent purchasers it was held that **voluntary conveyances** of land made with any clause of revocation at the will of the grantor were void as against subsequent purchasers for value from the grantor. But this judicial interpretation of the Act was removed by the Voluntary Conveyances Act, 1893, and now it is provided by the Law of Property Act, 1925, s. 173, that every voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser, but no voluntary disposition shall be deemed to have been made with intent to defraud by reason only that a subsequent conveyance for valuable consideration was made if such subsequent conveyance was made after June 28, 1893.

Free enjoyment.—A tenant in fee simple has the right of free enjoyment, and may commit any waste or use his lands as he pleases, provided that he does not inflict any injury upon his neighbours by infringing their legal rights to enjoy their lands in the same manner, *e.g.*, by creating a nuisance or by causing damage through the escape from his own land of water, filth or any noxious matter collected or brought upon the land by him (*i*); provided also that his rights have not been curtailed by his own or his predecessor's contracts or by statutory regulations (*k*).

Restrictions on alienation cannot, as a rule, be annexed to any gift of property, but (i) the *duration of* a gift may be limited to a time during which it can be personally enjoyed by the grantee. Thus land may be given to or in trust for A. *until* he becomes bankrupt or attempts to dispose of it. But a man cannot settle his *own* property on himself so that on his bankruptcy it shall go over to some other person and not pass to the trustee in bankruptcy (*l*). (ii.) Property may be settled on a married woman so that she cannot dispose of it during

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(*i*) *Rylands* v. *Fletcher*, L. R. 3 H. L. 330; *Bradford Corporation* v. *Pickles*, [1895] A. C. 587; *Musgrove* v. *Pandelis*, [1919] 2 K. B. 43; *Belvedere, &c., Co.* v. *Rainham Chemical Works*, [1920] 2 K. B. 487; [1921] A. C. 465; *Hoare, &c.* v. *McAlpine*, [1923] 1 Ch. 167.

(*k*) For liability of lands to their owner's debts, see *post*, Chap. XII.

(*l*) See *Mackintosh* v. *Pogose*, [1895] 1 Ch. at p. 511. This rule applies only to a limitation upon bankruptcy (*Detmold* v. *Detmold*, 40 Ch. D. 585).

marriage (*m*). (iii.) The policy of the law prohibits the alienation of certain property, *e.g.*, pensions and salaries given by the State for the performance of present or future duties.

The Heir.—Subject to debts (*n*) and to the rights of his or her wife or husband (*o*), and subject also to the L. T. A. 1897 (*p*), the lands of a tenant in fee simple, if undisposed of by his will, descended before 1926 to his heir. The heir is appointed by law. All other persons whom an individual may appoint as his successors, *e.g.*, a devisee under his will, are *assigns*. The heir comes into existence only upon the decease of the ancestor; during his lifetime a man can only have either (i.) an *heir apparent*, that is, a person who, if he survives, must be the heir, *e.g.*, his eldest son, or (ii.) an *heir presumptive*, *i.e.*, a person who would be heir if the ancestor died at once, *e.g.*, his eldest daughter.

Sub Hen. II. estates of inheritance held by military tenure descended first to the eldest son, while those of free sokemen were either shared among the sons or passed to the youngest or eldest according to the custom. In default of sons, they passed in either case to daughters in equal shares. Next came descendants of children, and in default of them the collateral relations. In the later socage tenure the land followed the rules of descent applicable to military tenure, and descent to the eldest of several males in the same degree was the rule for all freehold land except gavelkind.

By Bracton's time it was established that all descendants *in infinitum* of any person who would have been heir should inherit in his place by representation. A lineal ancestor, however, could never be heir to his descendant, and kindred of the half blood were altogether excluded.

These rules remained unaltered until the Inheritance Act, 1833 (*q*), by which they were to some extent modified. They have now lost most of their importance owing to the legislation

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(*m*) She may, however, in spite of a restraint upon anticipation, have the powers of a tenant for life under the S. L. A., 1925 (*id.*, ss. 1, 20, 25).

(*n*) *Post*, Chap. XII.

(*o*) *Post*, Chap. XIV.

(*p*) *Post*, p. 52.

(*q*) *Post*, p. 55.

of 1925, though for some time a knowledge of the old law will be necessary in the investigation of titles. And even under the new system there will be cases where the old law will not be entirely inoperative, as *e.g.*, where a lunatic, living and of full age on January 1, 1926, dies without recovering testamentary capacity, in which case his real estate will descend to his heir as ascertained by the law before 1926 (*r*).

CHAPTER V.

OF AN ENTAILED INTEREST.

An **entailed interest** is an estate given to a man and the *heirs of his body*. Hitherto it might have been created either as a legal estate or an equitable interest. But now (*s*) it can exist only as an equitable interest and all existing legal estates were on January 1, 1926, converted into equitable interests (*t*). Formerly, however, it could be created only in real property, and a gift of personalty, including leaseholds, with such words of limitation as would create an estate tail in realty conferred an absolute interest in the personalty. But by section 130 of the **Law of Property Act, 1925,** an entailed interest may be created by way of trust in real or personal property and all statutory provisions relating to estates tail in realty apply also to entailed interests in personalty. But it can be created only by a settlement of realty or personalty, or the proceeds of sale thereof (including the will of a person dying after 1925), or by an agreement for a settlement in which the trusts to affect the property are sufficiently declared.

Such an interest, if left to itself, will descend on the death of the first owner to all his lawful issue *in infinitum*, but determines on cessation of issue. It may be either **general,** *i.e.*, to the heirs of his body generally, or **special,** *e.g.*, restrained to heirs of his body by a particular wife. It may also be

(*r*) A. E. A., 1925, s. 51.
(*s*) L. P. A., s. 1 (3), s. 130.
(*t*) *Id.*, s. 39, 1st Sched., Part I.

in tail male or *in tail female*, descending only to males or females (*u*).

History.—To prevent collateral relations succeeding to a tenant in fee who left no issue, it was necessary to limit the estate to him and *the heirs of his body*, making a *conditional gift*, the condition implied being that if the donee died without such heirs, or if such heirs failed at any future time, the land should revert to the donor. By the time of Edward I. it was held that the mere birth of issue was a performance of the condition so as to enable the donee to alienate in fee and prevent the land from reverting to the donor if his issue came to an end.

To remedy this, it was provided by the *De Donis Conditionalibus* (13 *Edw. I., c.* 1) that in case of such a gift the will of the donor shall be observed, and that the donee should have no power of alienation so as to prevent the land from descending to his issue or reverting to the donor on failure of issue.

Since this statute an estate given to a man and the heirs of his body has been termed an estate tail, or now, more strictly, an entailed interest (*x*). The inconvenience of strict entail soon became manifest, and means were found of evading the statute. It was held that if a tenant in tail disposed of the land, but left *assets*, or lands of equal value, to his issue, the issue were bound to abide by his alienation. Further, it was held that the issue would be barred if a mere *judgment* had been obtained entitling them to recover lands of equal value from some other person. And this held good even though the judgment had been obtained by collusion with the tenant in tail.

Recoveries and Fines.—An estate tail might accordingly be barred by judicial proceedings as follows:—

If A. warranted the title of lands given by him to B., he might be called upon to defend any action brought to recover

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(*u*) A special but rare kind of entailed interest is one given to B. and to the heirs of the body of A., some deceased ancestor of B., whose lineal heir B. is. Here B. takes an entailed interest but of such a nature that the land may descend, after the failure of *his* issue, to other issue of A. (See *Re Mountgarret*, [1919] 2 Ch. 294.)

(*x*) But the person entitled to an entailed interest is still sometimes spoken of as the tenant in tail. (See S. L. A., 1925, s. 117 (1).)

the lands from B. or to surrender to B. lands of equal value. The tenant in tail therefore, on a collusive action being brought against him, *vouched to warranty* X., some man of straw, *i.e.*, called on him to defend the action as having been the original donor of the estate tail; X. allowed judgment to go by default. The plaintiff (demandant) got judgment to recover the land from the tenant in tail, who in his turn got judgment to recover land of equal value from X. The effect of this mere judgment for recovery against X. was to bar not only the issue but also the reversion of the donor and any remainders after the estate tail, and the plaintiff became possessed of an estate in fee simple, which he disposed of according to the wishes of the tenant in tail.

Later the proceedings were varied as follows:—The lands were conveyed by a deed called the recovery deed to another person, D., against whom the action was brought and who was called tenant to the *præcipe*, or writ. D., being sued, vouched to warranty the tenant in tail, who in his turn vouched to warranty the crier of the Court, who was termed the common vouchee. The common vouchee then allowed judgment to go by default and a writ was directed to the sheriff to put the demandant in possession.

The claim of the *issue*, though not the remainders and reversion, might also be barred by a **fine.** This was a compromise made by leave of the Court in a genuine or fictitious action, whereby the lands were acknowledged to belong to one of the parties. It was enrolled among the records of the Court and put an end to all claims not made within a year and a day.

Originally the *De Donis* prevented an estate tail from being barred in this way, but by statutes of Hen. VII. and Hen. VIII. a fine by a tenant in tail had the effect of barring his issue.

Both fines and recoveries were abolished by the **Fines and Recoveries Act, 1833,** which substituted for them a simple deed executed by the tenant in tail and inrolled formerly in the Court of Chancery and later in the Central Office of the Supreme Court. And, although now an entailed interest can only be created by way of trust, it is expressly provided that a tenant in tail shall have the same right to bar the entail as he had

before 1926; but the necessity for inrolment is abolished as regards disentailing assurance made or executed after 1925 (*y*).

No plan can now be adopted whereby lands can be tied up for a longer period than the lives of existing persons and 21 years from their decease. Where estates are kept up from one generation to another, this is done only by re-settlement. Thus, on a marriage settlement, land is settled on the husband for life, and on his death to the first and other sons successively in tail male. The estate is thus tied up until some tenant in tail attains twenty-one. He then, with his father, who is a life tenant in possession, bars the entail, and the land is re-settled on the father for life, with remainder to the son for life, and remainders to the son's eldest and other sons in tail.

Hitherto settlements *inter vivos* have usually been effected by one deed and the life estate and the estates tail have, by the operation of the Statute of Uses, taken effect as legal estates. Now, however, the Statute of Uses is repealed and neither a life estate nor an entailed interest can exist as a legal estate.

Accordingly, by the **Settled Land Act, 1925,** the legal estate is made to vest in the tenant for life or statutory owner (*z*). Moreover the equitable interests arising under the settlement are removed from the legal estate in the settled land and, except as otherwise provided in the Act, every settlement *inter vivos* of a legal estate in land must be effected by two deeds (*a*), namely:—

1. A *vesting deed*, which conveys the land to the life tenant or statutory owner and contains—

(a) a description of the settled land;

(b) a statement that it is vested in the person or persons to whom it is conveyed upon the trusts affecting it;

(c) the names of the trustees of the settlement;

(d) any additional powers conferred by the trust instrument

(*y*) L. P. A., 1925, s. 130 (1), s. 133.

(*z*) Section 4 (2). The term "statutory owner" means the trustees of the settlement or other persons who, during a minority or at any time when there is no tenant for life, have the powers of the tenant for life (section 117).

(*a*) *Id.*, ss. 4, 5.

relating to the settled land which by virtue of the Act operate as if conferred by the Act on a tenant for life;

(e) the name of any person entitled under the trust instrument to appoint new trustees of the settlement (*b*); and

2. A *trust instrument* which—

(a) declares the trusts affecting the settled land;

(b) appoints or constitutes trustees of the settlement;

(c) contains the power, if any, to appoint new trustees;

(d) sets out, expressly or by reference, any powers intended to be conferred by the settlement in extension of those conferred by the Act;

(e) bears any *ad valorem* stamp duty payable in respect of the settlement.

A purchaser of the legal estate in the settled land is not concerned with the trust instrument but only with the vesting deed. Thus the trusts are removed from the title, for it is the trust instrument which gives the life estate and entailed interests which take effect as equitable interests only.

Where an estate tail is not in possession, the right to bar it is subject to limitations. A recovery could be suffered only by a tenant in tail in possession or a tenant in tail in remainder with the consent of the first tenant for life. On the same principle a tenant in tail not in possession can at present bar the reversion and remainders only with the consent of the *protector of the settlement*, who is usually the first life tenant in possession created by the same instrument as that creating the estate tail (*c*). If the protector refuses his consent, the tenant in tail can bar his own issue, but he cannot bar the reversion and remainders. The estate thus created is a **base fee,** the tenant in tail acquiring a disposable interest merely so long as he has any issue or descendants living. A base fee cannot now exist as a legal estate, an entailed interest being in itself only an equitable interest, but it is expressly provided that the tenant

(*b*) These particulars may be incorporated by reference to an existing vesting instrument, and where there is a settlement existing before 1926 by reference to that settlement, and to any instrument whereby land has been conveyed to the uses or upon the trusts of that settlement (section 5 (2)).

(*c*) Fines and Recoveries Act, 1833, s. 22.

in tail may bar the entail either absolutely or so as to create an interest equivalent to a base fee (*d*).

A base fee may be *enlarged* into a fee simple absolute (*i.e.*, the remainders and reversion may be barred) by deed executed by the person who would have been tenant in tail if the estate tail had not been converted into a base fee; but the consent of the protector is necessary until the protectorship of the settlement has come to an end (*e*). It will also be enlarged into a fee simple absolute if the owner of the base fee continues in possession for 12 years after the protectorship of the settlement has come to an end (*f*).

The following estates tail **cannot be barred**:—

(1) Certain entails created by particular Acts.

(2) An estate in *special* tail held by a person who is *tenant in tail after possibility of issue extinct*, *e.g.*, if an estate is given to a man and the heirs of his body by his wife B., it cannot be barred after the death of B.

Hitherto an estate tail could not be barred by will. But by section 176 of the **Law of Property Act, 1925,** a tenant in tail of full age can dispose by will (i.) of all property of which he is tenant in tail in possession at his death; and (ii.) of money subject to be invested in the purchase of property, of which, if it had been so invested, he would have been tenant in tail in possession at his death, in like manner as if, after barring the entail, he had been tenant in fee simple or absolute owner thereof for an equitable interest at his death. The term "tenant in tail" in this section includes the owner of a base fee in possession who can without the concurrence of any other person enlarge the base fee into a fee simple, but does not include a tenant in tail who is restrained by statute from barring his estate tail or a tenant in tail after possibility of issue extinct. Any interest so disposed of by a tenant in tail vests in his P. R. and is subject to his debts (*g*). Subject to and in default of any such disposition an entailed interest will descend as an

(*d*) L. P. A., s. 130 (1).
(*e*) Fines and Recoveries Act, 1833, ss. 19, 40.
(*f*) 37 & 38 Vict. c. 57, s. 6.
(*g*) A. E. A., s. 3 (2).

equitable interest to the *heirs of the body as ascertained before* 1926 (*h*).

Powers of a Tenant in Tail.—A tenant in tail may make any disposition of the lands to hold good during his own life. And by statute he may make dispositions binding his issue and the reversioners or remaindermen. Thus by the Act of 1833 a tenant in tail in possession may, without a deed enrolled, make leases for not more than twenty-one years and at not less than five-sixths of a rack rent.

And the following have all the powers of a life tenant under the **S. L. A., 1925,** when entitled in possession (*i*):—(i.) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring his estate tail, but not a tenant in tail of land purchased with money provided by Parliament in consideration of public services, who is restrained by Act of Parliament from barring the entail ; (ii.) a person entitled to a base fee or to any corresponding interest in leasehold land; (iii.) a tenant in tail after possibility of issue extinct.

A tenant in tail has the same rights of enjoyment as a tenant in fee simple and may commit any waste.

Tenure of Estate Tail.—If a tenant in fee simple granted his lands for an estate tail, *tenure* was created between him and his grantee, as the *Quia Emptores* prohibited subinfeudation only in case of grants in fee simple; and on creation of such an estate any rent or services might be reserved.

CHAPTER VI.

OF AN ESTATE FOR LIFE.

A **life estate** is a freehold not of inheritance, the tenant's interest ceasing at his death and not passing to his representatives; *it can now exist only as an equitable interest* (*a*). To create such an estate it is usual to limit the lands to the

(*h*) L. P. A., s. 130 (4), s. 176 (1); A. E. A., s. 51 (4).
(*i*) *Id.*, s. 20, see *post*, p. 32.
(*a*) L. P. A., 1925, s. 1.

grantee "during his life." A grant of land by deed "to A." simply without further words expressly conferring on him an estate transmissible to his heirs formerly gave him only a life estate. But in wills made after 1837, by the *W. A.*, 1837, a devise of real estate without words of limitation passes the fee simple or the whole estate or interest of which the testator had power to dispose unless a contrary intent appears by the will. And by the **Law of Property Act, 1925** (*b*), this rule is extended to conveyances and deeds executed after 1925.

If a tenant in fee simple granted lands to another for life, tenure was created, as on the gift of an estate tail, and rent or services might be reserved. In early times life estates often arose under leases at money rents, but now they arise chiefly under settlements, and no rent is reserved.

A life estate may be **determined** not only by natural but by civil death, *e.g.*, outlawry in criminal proceedings.

Powers of enjoyment.—A life tenant, unless restrained by agreement, has the right to cut wood for fuel, for instruments of husbandry, and for repairs, and also to cut underwood and lop pollards. But he may not commit any voluntary waste. Thus he may not cut timber or open new mines, but he may continue to work mines already open, and may also cut timber on a timber estate previously cultivated with a view to periodical croppings (*c*). Formerly the committing of waste entailed forfeiture enforced by a writ of waste. Now a life tenant is liable only to pay damages for any waste committed, but may be restrained by injunction from committing further waste. Under the **S. L. A. 1925** (*d*), a life tenant *impeachable for waste* in respect of timber may cut and sell any ripe timber with the *consent* of the trustees of the settlement or under an order of the Court, and may keep one-fourth of the proceeds, the rest being set aside as capital.

If the estate is given to the life tenant by a written instrument expressly declaring his estate to be *without impeachment of waste*, he may cut timber and open mines, and commit other

(*b*) Section 60.

(*c*) See *Dashwood* v. *Magniac*, [1891] 3 Ch. 306; *Re Trevor-Battye's Settlement*, [1912] 2 Ch. 339.

(*d*) Section 66, re-enacting S. L. A., 1882, s. 35.

waste for his own benefit. But even in this case he may not without express power commit **equitable waste,** *i.e.*, pull down the mansion house or cut ornamental timber (*e*).

A life tenant is not liable for **permissive waste,** *i.e.*, mere non-repair, unless the duty of repair is expressly laid on him by his grantor (*f*).

A life tenant could not at C. L. make any disposition to last beyond his own life, and he can still do no more for his own exclusive benefit. But he has large powers of disposition for the benefit of those entitled after his death as well as himself. **Powers** are means of conveying lands independently of the right of alienation incident to the estate in the land, *i.e.*, powers given to a life tenant of creating leases to hold good after his death. They could originally arise, in the case of settled land, only by the express provision of the parties creating the settlement; but now, **under the Settled Land Act, 1925,** which consolidates and amends the Settled Land Acts, 1882-90, every life tenant in possession under a settlement has wide powers of selling, leasing, &c., exercisable as trustees for all parties entitled under the settlement, but not for his own benefit to the prejudice of his successors; any capital money arising under the Act must, however, be paid to trustees of the settlement or into Court (*h*). The chief of these powers are—

(1) To create building or forestry *leases* for not more than 999 years, mining leases 100 years, other leases 50 years (*i*). But the mansion house and grounds (except where occupied as a farmhouse, or where the site of the house and grounds does not exceed twenty-five acres) may not be leased without consent of the trustees or order of the Court if either (i.) the settlement was made or came into operation before 1926 and did not expressly give this power to the life tenant without such consent or order; or (ii.) the settlement, though made or

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(*e*) See L. P. A., 1925, s. 135.

(*f*) *Jay* v. *Jay*, [1924] 1 K. B. 826.

(*h*) S. L. A., 1925, s. 6.

(*i*) *Ibid.*, s. 41. Before 1925 he could only grant (i) building leases for ninety-nine years; (ii) mining leases for sixty years; (iii) other leases for twenty-one years in England or Wales and thirty-five in Ireland (S. L. A., 1882, s. 6).

coming into operation after 1925, expressly makes necessary such consent or order (*k*). A life tenant intending to exercise these statutory powers must give notice to each of the trustees and their solicitor if known to him (*l*). Every lease must be by deed, must take effect in possession not more than twelve months from its date, or in reversion after an existing lease not having more than seven years to run at its date, must be at the best rent possible, regard being had to any fine taken, and must contain a covenant for payment of rent and a condition of re-entry on non-payment within thirty days (*m*). But a lease for not more than twenty-one years, at the best rent obtainable without fine and whereby the lessee is not exempted from punishment for waste, may be made without notice to the trustees and although there are no trustees, and if for not more than three years may be by writing under hand only (*n*). Building, mining and forestry leases are subject to additional regulations (*o*). Any fine received on the grant of a lease must be applied as capital money (*p*). In mining leases three-quarters of the rent must be applied as capital if the life tenant is impeachable for waste in respect of minerals, otherwise a quarter (*q*).

(2) To *sell or exchange* the whole or any part of the settled land, subject to similar rules in the case of sale or exchange of the mansion house and subject to giving *notice* as above (*s*). Every sale and exchange must be at the best consideration that can reasonably be obtained; but a sale of settled land or of any easement, right or privilege over it, may be made in consideration, wholly or partly, of a rent secured on the land sold or the land to which such easement, &c., is annexed; such rent may be perpetual or terminable (consisting of principal and interest) and may be a nominal rent for the first five years; and

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(*k*) S. L. A., 1925, s. 65. Under the S. L. A., 1890, such consent or order was always necessary save in the excepted cases in brackets.
(*l*) *Id.*, s. 101.
(*m*) *Id.*, s. 42 (1), (2).
(*n*) *Id.*, s. 42 (5).
(*o*) *Id.*, ss. 44, 45, 46, 48.
(*p*) *Id.*, s. 42 (4).
(*q*) *Id.*, s. 47.
(*s*) *Id.*, ss. 38, 65.

on a sale to any company incorporated by Act of Parliament, or any order, &c. confirmed by Parliament or having the force of an Act of Parliament the consideration may, with the consent of the life tenant, consist of fully paid securities of the company, to be vested in the trustees and held by them as if they were securities authorised by the Act; and, for the development, improvement or benefit of the settled land a tenant for life may make a grant in fee simple or a lease for any term of years absolute, for a nominal price or rent or gratuitously, (i.) for the site of public buildings of various kinds; (ii.) for the construction or improvement of any railway, canal, road, dock, embankment, drain, watercourse or reservoir; (iii.) for any other public or charitable purpose in connection with the settled land or for the benefit of persons residing thereon (*t*). All money received on sale or exchange must be paid to the trustees or into Court, and is to be invested by the trustees according to the directions of the life tenant or of the Court, in any of the investments authorised by the Act; all capital money arising under the Act is made subject to the settlement as if it were land, and the income of invested capital is paid to the persons entitled to the income of the land (*u*).

(3) To raise money by legal mortgage on the settled land for various purposes including the discharge of any incumbrance on the settled land, payment for any improvement authorised by the Act or the settlement and equality of exchange (*x*).

The tenant for life also has many miscellaneous statutory powers. And the Act provides that, as from January 1, 1926, *any transaction* (not being an application of capital in an unauthorised improvement) affecting the settled land which, in the opinion of the Court, is for the benefit of the settled land or the persons interested under the settlement, may, under order of the Court, be effected by the tenant for life, if it is one which could have been validly effected by an absolute owner (*y*).

For carrying into effect any of his statutory powers the life tenant can convey the settled land to the extent of the estate or interest vested in him by the last or only vesting instrument

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(*t*) S. L. A., 1925, s. 39.
(*u*) *Id.*, s. 75.
(*x*) *Id.*, s. 71.
(*y*) *Id.*, s. 64 (1).

affecting the settled land, or for any less estate or interest, but he can effect a mortgage only by creating a term of years absolute or a charge by way of legal mortgage (*z*).

The powers of a life tenant under the Act cannot be assigned or released and remain exercisable by him although he assigns his estate (*a*). But where an assignment for value was made before 1926 (except an assignment in consideration of marriage or by way of family arrangement) the rights of the assignee cannot be effected without his consent except that (i.) unless he is in possession his consent is not required for the making of leases under the Act at the best rent obtainable without fine and (ii.) his consent is not requisite to an investment of capital money for the time being affected by the assignment in authorised trust securities; and even where the assignee's consent ought to be obtained a purchaser from the life tenant exercising his statutory powers is not concerned to enquire if the consent of the assignee has been obtained (*b*). And where an assignment for value is made or comes into operation after 1925 the consent of the assignee is never requisite for the exercise by the life tenant of his statutory powers (*c*).

A contract by a tenant for life not to exercise any of his powers under the Act is void (*d*) as also is any provision in the settlement forbidding him to exercise them (*e*).

If, after 1925, a life tenant surrenders his estate or interest to the person next entitled in reversion or remainder, the statutory powers of the tenant for life cease, and become exercisable as if he were dead, if and when the reversioner or remainderman would have those powers if he were in fact dead.

A settlement may confer on the life tenant or trustees any powers wider than the statutory powers (*f*) and nothing in the Act is to prejudicially affect any other powers given by the settlement or statute to the life tenant or trustees, but in case of a conflict between a settlement and the Act with regard to any

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(*z*) S. L. A., s. 72.
(*a*) *Id.*, s. 104.
(*b*) *Ibid.*
(*c*) *Ibid.* The section also makes provisions for the protection of the assignee.
(*d*) *Ibid.* (*e*) *Id.*, s. 105. (*f*) *Id.*, s. 109.

power of the tenant for life or statutory owner the provisions of the Act will prevail (*g*). Where, however, a settlement gives to the trustees or to other persons any power (not being merely a power of revocation or appointment) relating to the settled land, such power is to be exercisable by the life tenant or statutory owner as if conferred upon him by the settlement (*h*).

Improvements.—By the **Improvement of Land Act, 1864,** and earlier Acts of Queen Victoria's reign power was given to borrow money for certain improvements on settled land, to be repaid with interest by equal instalments and charged as a rentcharge upon the inheritance of the land. And by section 30 of the **S. L. A., 1882,** which section is still in force, the Act of 1864 is extended so as to include all improvements authorised by the S. L. A., 1882. In addition to these facilities for borrowing money, any capital money arising under the **S. L. A., 1925,** may be applied at the instance of the tenant for life in payment for any improvement authorised by that Act (*i*). Before 1926 a life tenant before making any improvement authorised by the S. L. A., 1882 (as amended by the S. L. A., 1890), was required to submit to the trustees or to the Court a scheme showing the proposed expenditure, and before applying any capital in payment for such improvements was required to obtain certain certificates or an order of the Court. These provisions are now repealed. Where capital is in the hands of trustees they may apply it to payment for authorised improvements (i.) on a certificate of a competent engineer or surveyor employed independently of the life tenant or (ii.) on an order of the Court. Where the capital money is in Court, the Court may order it to be so applied on a report of the Minister of Agriculture and Fisheries or of a competent engineer or surveyor appointed by the Court, or on such other evidence as the Court may think sufficient (*k*). And the Court may also direct or authorise capital to be applied in payment for any improvement (even though effected before 1926) authorised by the S. L. Acts, 1882 and 1890, although no scheme was submitted as required by the Act of 1882, and although no capital is immediately available for the

(*g*) S. L. A., 1925, s. 108.
(*h*) *Ibid.* (*i*) *Id.*, s. 83. (*k*) *Id.*, s. 84.

purpose (*l*). The life tenant must maintain improvements executed under the Act and is protected from impeachment of waste in respect of any stone, clay, sand, timber, &c., properly gotten or cut for that purpose (*m*).

Determinable life estates arise where land is given to a widow during her widowhood, or to a man until he become bankrupt, or for any similar definite period of time of *uncertain* duration.

If a life tenant die before harvest, his personal representatives will be entitled to the **emblements** (i.e., to reap the crop sown) unless the estate is determined through the tenant's own act. An under-tenant, however, in all cases is entitled to the emblements. But, by the Emblements Act, 1851, tenants holding at a rack rent, instead of claiming emblements, continue to hold on to the expiration of the current year of the tenancy, paying a proportionate part of the rent to the succeeding owner (*n*).

Apportionment of rent.—At C. L. rent was not apportionable. If a life tenant let land reserving rent quarterly and died between two quarter days, no rent was due from the under-tenant to anyone from the last rent day to the death. Also, if a life tenant had a *power* of leasing, his executors had no right to any part of the rent in case of his death between two quarter days, but the whole quarter's rent went to the person next entitled. Now, by the **Apportionment Act, 1870,** all rents and other periodical payments in the nature of income are considered as accruing from day to day and apportionable accordingly.

Pur autre vie estates.—If a life tenant assigns his estate, the assignee is entitled to an estate for the life of the assignor, who is called the *cestui que vie*. Such an estate is called a *pur autre vie estate*, and, after 1925, can only be an equitable interest. But by section 111 of the **Settled Land Act, 1925,** it is provided that where on January 1, 1926, the legal beneficial interest of a tenant for life under a settlement (*o*) is vested in a purchaser, or

(*l*) S. L. A., 1925, s. 87.

(*m*) *Id.*, ss. 88, 89.

(*n*) By section 14 of the Agriculture Act, 1920, tenants of an agricultural holding continue in occupation until the expiration of a twelve months' notice to quit, expiring at the end of a year of the tenancy.

(*o*) Any instrument under which land is limited in trust for any persons by way of succession is a settlement (*Ibid.*, s. 1 (1)), so that, after 1925, a life estate can exist only under a settlement.

after that date a tenant for life conveys or deals with his interest in possession in favour of a purchaser and the interest so conveyed or created would, but for the Act, have been a legal interest, the purchaser shall (without prejudice to the powers conferred by the Act on the tenant for life) have all the same rights and remedies as if the interest had remained a legal interest. A tenant *p. a. v.* was formerly entitled to enjoy the property only so long as he himself lived, unless it was granted to him and his heirs. Otherwise at his death anyone could enter as *general occupant* and enjoy the property during the life of the *c. q. v.* If it was granted to him and his heirs during the life of the *c. q. v.*, the heir entered as *special occupant*. By the **Wills Act, 1837,** replacing earlier statutes to the same effect, a tenant *p. a. v.* was given power to dispose of his interest by will. If he so disposed of it, or if he died intestate and there was no special occupant, it devolved upon his executors or administrators, and was subject to his debts and dealt with as personalty. Under the **L. T. A., 1897,** on the death of a tenant *p. a. v.*, his estate devolved in the first instance on his executors or administrators, whether devised or not, and whether or not there was a special occupant. But the beneficial title of a devisee or special occupant was not disturbed. By the **Administration of Estates Act, 1925** (*oo*), special occupancy is abolished and all the property of a deceased intestate devolves on his P. R. and is distributed in accordance with the Act.

By 6 *Anne*, *c.* 18, any reversioner or remainderman may, on affidavit that he has reason to believe that the death of the *c. q. v.* is concealed, obtain from the Lord Chancellor an order for his production.

If a *p. a. v.* estate is given to a man and the heirs of his body, a **quasi entail** is created, which may be barred by ordinary deed of conveyance and after 1925 may be disposed of by will (*p*).

By section 20 of the **Settled Land Act, 1925,** the following, when of full age and entitled in possession, have all the powers of a tenant for life under that Act:—

(i) A person entitled to land for an estate in fee simple or

(*oo*) Section 45. See *ante*, p. 21.
(*p*) L. P. A., 1925, ss. 130, 176.

for a term of years absolute, with an executory limitation over on failure of his issue or in any other event:

(ii) A person entitled to a base or determinable fee or to any corresponding interest in leaseholds:

(iii) A tenant for years determinable on life not holding merely under a lease at a rent:

(iv) A tenant for the life of another, not holding merely under a lease at a rent:

(v) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, or to be defeated by an executory limitation over, or is subject to a trust for accumulation of income:

(vi) A tenant by the curtesy:

(vii) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, or to a trust for accumulation of income for any purpose, or until sale of the land, or until forfeiture, cesser or determination of his interest, unless the land is subject to an immediate trust for sale:

(viii) A person beneficially entitled to land for an estate in fee simple or for a term of years absolute, subject to any estates, interests, charges, or powers of charging, subsisting or capable of being exercised under a settlement:

(ix) A married woman entitled to land for an estate in fee simple or for a term of years absolute, subject to a restraint on anticipation.

CHAPTER VII.

JOINT TENANTS AND TENANTS IN COMMON.

A GIFT of two or more in **joint tenancy** makes them, as regards all *other* persons, one single owner, but as between themselves they have separate and equal rights. A joint tenancy is therefore distinguished by unity of *possession*, *interest*, *title* and *time*

of the commencement of title. Joint tenancy is now the only form of co-ownership which is recognised as regards legal estates.

Any estate may be held in joint tenancy. Thus land may be given to A. and B. as joint tenants for life, in which case, however, they now have only equitable interests. While both live each is entitled to one moiety of the rents and profits, but after the death of either the survivor is entitled to the whole during the residue of his life.

If land is given to A. and B. and the heirs of their two bodies, then (i.) if A. and B. can marry they have an interest in special tail; (ii.) if A. and B. cannot marry, on the death of either the survivor takes the whole as long as he lives, but on his death it is divided between the heirs of the body of A. and of B. who hold in equity as tenants in common.

If an estate in fee simple is given to two or more as joint tenants, no one of them can devise his share by will and the survivor is entitled to the whole. If he is a trustee of the land it will vest in his P. R., notwithstanding any testamentary disposition thereof by him (*r*). If he is entitled for his own use his P. R. will hold the land (i.) where he died before 1926, for his heir or devisee; (ii.) where he died after 1925, on trust for sale as if the whole estate had originally been granted to him alone (*s*).

By section 36 of the **Law of Property Act, 1925,** it is provided that where after 1925 a legal estate (*not being settled land*) is beneficially limited to or held in trust for joint tenants, it shall be held on trust for sale as if they were tenants in common. It is, therefore, now impossible for persons to be entitled *beneficially* to a *legal* estate in fee simple as joint tenants, though they may be joint tenants in equity.

Where persons are entitled as joint tenants for life or for an entailed interest their interests must now be equitable, and the instrument by which the land is limited on trust for them is a settlement, and the land is settled land, and the joint owners together constitute the tenant for life (*t*).

(*r*) A. E. A., 1925, ss. 1, 3, replacing section 30 of the C. A., 1881.
(*s*) A. E. A., s. 33.
(*t*) S. L. A., 1925, ss. 1, 2, 19, 20.

In the case of conveyances taking effect under the St. Uses (now repealed) it was held that joint tenants might take their shares at different times, and this exception extends to estates created by will and to joint tenancies taking effect in equity after 1925.

The proper form of conveyance between joint tenants is a **release,** each one already having the seisin of the whole. Before 1926, if one joint tenant alienated his share *during his life*, the joint tenancy was *severed*, and the assignee held as tenant in common with the other or others of the original joint tenants, who remained joint tenants of their two third shares. Joint tenancy might also be severed by operation of law, as upon the bankruptcy of a joint tenant.

But, under the **L. P. A., 1925,** no severance of a joint tenancy of a *legal* estate, so as to create a tenancy in common, is permissible. But one joint tenant may still release his interest to the other or others and may sever the joint tenancy in an *equitable* interest, and, where a legal estate (not being settled land) is vested in joint tenants beneficially it may be severed in equity (*u*).

Tenants in common have unity of possession, but distinct and several titles; their shares need not be equal, nor need their interests be the same, and there is no right of survivorship.

By the **L. P. A., 1925,** a *legal* estate cannot subsist in an undivided share in land, which can be created only by a trust for sale. If land is expressed to be conveyed to persons of full age in undivided shares, it becomes vested in them, or if more than four, in the first four named in the conveyance, upon the statutory trusts, *i.e.*, on trust to sell and stand possessed of the net proceeds upon such trusts and subject to such powers and provisions as are requisite for giving effect to the rights of the persons interested in the land (*x*). If it is desired to make such persons tenants in common with life interests, or other limited interests, a settlement is created within the **S. L. A., 1925,** and the land must be vested in the trustees of the settlement (*y*).

(*u*) Section 36. But no severance of a mortgage term or trust estate, so as to create a tenancy in common, is permissible.

(*x*) Sections 34, 35.

(*y*) S. L. A., 1925, s. 36.

The **L. P. A., 1925,** also provides (*z*) that a gift or appointment by will, operating after 1925, of land to two or more persons in undivided shares shall operate as a devise bequest, &c., to the trustees of the will for the purposes of the S. L. A., 1925, or (if more) to the P. R. upon the statutory trusts, but without prejudice to the powers of the P. R. for purposes of administration.

As to tenancies in common existing immediately before 1926, the **L. P. A., 1925** (*a*), provides (1) that if *vested* in possession before 1926 then (i.) if the entirety of the land is vested in trustees or P. R. it is to be held by them upon the statutory trusts; (ii.) if, not being settled land, it is vested absolutely and beneficially in not more than four persons of full age free from incumbrances affecting the undivided shares it vests in them as joint tenants upon the statutory trusts; (iii.) if it is settled land held under one settlement it vests in the trustees of the settlement upon the statutory trusts or, if no trustees, in the Public Trustee; (iv.) in every other case it vests in the Public Trustee upon the statutory trusts. (2) If undivided shares *fall into possession* after 1925 and the land is not settled land, the P. R. or other estate owner in whom it is vested must, by assent or conveyance, give effect to the foregoing provisions and in the meantime the land is to be held on the statutory trusts. But none of the foregoing provisions apply (i) if a contract to sell the land is in force at the end of 1925 and is subsequently completed; (ii.) if a partition action is pending at the end of 1925 and an order for partition is subsequently made.

Partition.—Both joint tenants and tenants in common could compel partition. Originally this was effected by a writ of partition granted under statutes of Hen. VIII., before which it could be effected only by mutual consent.

In 1833 the writ of partition was abolished, and it is now effected by a *partition action* in the Ch. D. The partition was carried out by mutual conveyances, which in the case of joint tenants were in the form of *releases*; in the case of tenants in common of grants.

By the **Partition Act, 1868,** the Court [Chancery Division]—

(*z*) Section 34.

(*a*) 1st Sched., Pt. IV.

(i.) *might* direct a sale instead of partition whenever it appeared to be more beneficial to the parties interested (**section 3**); (ii.) *must*, unless there is good reason to the contrary, direct a sale if so requested by parties interested in at least a moiety (**section 4**); (iii.) *might*, if it thought fit, direct a sale on the application of any party interested, unless the other parties or some of them undertook to purchase his share (**section 5**).

The Partition Act is now repealed (*b*) and, as already stated, a trust for sale is created in all cases of co-ownership. If the net proceeds of sale are absolutely vested in persons of full age in undivided shares, the trustees for sale may partition the land, but the consent of any persons of full age (not being annuitants), interested in possession in the rents and profits of the land until sale, must be obtained. If the trustees refuse to exercise this power, any person interested may apply to the Court for an order directing them to exercise it (*c*).

CHAPTER VIII.

THE CONVEYANCE OF A FREEHOLDING AT COMMON LAW.

At Common Law a freeholding was transferred by *feoffment* with *livery of seisin*. Feoffment properly is a gift of a *fee*, but came to be applied to the gift of any freehold. The feoffment need not have been put in writing, but formal livery of seisin was always necessary. This was either livery in *deed* or livery in *law*. **Livery in deed** was performed on the land itself, and was the actual delivery of possession by the feoffor to the feoffee. To make it effective, all persons having any estate or interest in the land must either join in making the livery or be absent from the premises. **Livery in law** was made in sight of the land, and no legal estate passed to the feoffee unless he made entry during the life of the feoffor.

Besides mere livery of seisin, it was necessary that apt words should be used to limit or mark out the estate of the feoffee,

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(*b*) L. P. A., 1925, s. 207. (*c*) *Id.*, ss. 28, 30.

e.g., the gift must be to him and his heirs, or him and the heirs of his body, according as he was to take an estate in fee simple or fee tail. If the land was given to him simply without further words or without using the proper technical words, *e.g.*, to him and his *assigns* for ever, he took merely a life estate.

Tortious Feoffment.—If A. made a feoffment to B. of a greater interest than he himself possessed, such feoffment operated *by wrong*. It conferred on the feoffee the whole estate limited by the feoffment and enabled him to maintain the seisin delivered to him against all except those whose title was displaced by the feoffment. And even they might in some case be deprived of all right to enter on the land, and might be left with merely a right to bring an action for its recovery.

By the R. P. A., 1845, a feoffment no longer can have any tortious operation.

Writing was not necessary for the validity of a feoffment; a charter declaring the grant was, however, often drawn up and sealed by the feoffor, and such a charter, even though unsealed, was proof of the grant. But soon after the Norman Conquest it was settled that a charter, to amount to conclusive proof, must be sealed by the grantor. Henceforward, only sealed documents were conclusive evidence, and, in fact, nothing was called a writing except a document under seal. Hence a deed is even now necessary wherever the Common Law requires writing. The superior importance of deeds still remains, and they can be enforced, although gratuitous, because of their formal nature. But agreements not made by deed, although made in writing, cannot be enforced unless the promisor received some valuable consideration in return for his promise.

In modern practice the mere placing of the finger on a seal already made is equivalent to sealing, and the words "I deliver this as my act and deed" are equivalent to delivery, even if the party keep the deed himself. An *escrow* is a deed delivered to some person not a party to it (*d*) to be delivered up to the other party on performance of some condition. It is not complete

(*d*) A deed may, however, be delivered as an *escrow* even to a grantee thereunder provided that it is not delivered to him *as grantee*, but as acting in some other capacity, *e.g.*, as solicitor to the grantor and other grantees (*London Freehold Co.* v. *Suffield*, [1897] 2 Ch. 608).

until delivered up on performance of the condition, but then takes effect from the date of its execution. Alterations, &c., in a deed are presumed to have been made before execution; any *material* (*e*) alteration after execution, either by a party or a stranger, makes a deed void as from the time when the alteration was made, but it does not avoid the deed *ab initio* or destroy any conveyancing effect which it has already had. If there is only one party to a deed, it is called a *deed-poll*; if more than one, an *indenture*.

At Common Law no one could take any immediate benefit under an indenture expressed to be made between certain parties, either by way of assurance of property to him, or of contract with him, unless he were named as a party to the deed. But now a person may take an interest in land or other property or the benefit of any condition, right of entry, covenant or agreement over or respecting land or property, although he is not named as a party to the conveyance or other instrument (*f*).

Until Charles II. writing remained optional in every case in which a deed was not necessary. But by the **St. Frauds** (29 *Car. II.* c. 3) it was provided that any estate or interest in lands made by livery of seisin only, and not put into writing, and signed by the parties or their agents authorised in writing, should have the effect of an estate at will only. From this were excepted leases not exceeding three years from the making, *and* on which a rent of at least two thirds of the full value is reserved. But by the **R. P. A., 1845,** a feoffment other than one made under a custom by an infant, which was, however, subject to the St. Frauds, was made void unless evidenced by deed.

Now, however, by the **Law of Property Act, 1925** (*g*), feoffment is abolished and all lands and interests therein now lie in grant. But the above provisions of the St. Frauds and the R. P. A. are in substance re-enacted and it is provided that all interests in land, except leases taking effect in possession for not more than three years at the best rent obtainable without taking

(*e*) *I.e.*, any alteration which varies the legal effect of the deed or prejudices the party to be bound thereby.

(*f*) L. P. A., 1925, s. 56, extending s. 5 of the R. P. A., 1845.

(*g*) Section 51.

a fine, shall, if created by parol and not put into writing signed by the parties or their agents, take effect as interests at will only (*h*); it is also provided that all conveyances of land are void for the purpose of conveying or creating a legal estate unless made by deed (*i*); and, in settlement of doubts, it is also provided that a person executing a deed must sign or place his mark upon it and that mere sealing is not sufficient (*k*).

Besides a feoffment, lands could at C. L. be conveyed without livery of seisin by fines and recoveries, lease and release, confirmation, exchange, or surrender. None of these methods was, however, effective without actual entry.

CHAPTER IX.

OF A MODERN CONVEYANCE.

Lease and Release.—Though in early law the possession of a lessee was merely that of a bailiff, yet after entry by him the interest of the lessor became only an incorporeal hereditament. If the lessor wished to transfer it, feoffment with livery of seisin was impossible, and the only method was a deed of *release*, which transferred the freehold as effectively as a feoffment.

In early times this method of conveyance was much used, a lease for one or more years being made, and upon entry of the lessee the freehold being transferred to him by release.

After the St. Uses an analogous method was used which did not require entry, namely **a bargain and sale** followed by a release. A., by verbal contract, bargained and sold his freehold to B., and, by the doctrines of Chancery, as soon as A. received the purchase money he was seised to the *use* of B., who thus by the Statute obtained without entry and without feoffment the actual seisin and possession.

This was put an end to by the **St. Enrolments** (27 *Hen. VIII.* c. 16), which required every bargain and sale of freeholds to be by deed enrolled. The Statute did not, however, apply to bargains and sales of *leaseholds*. It remained, therefore, possible

(*h*) Section 54. (*i*) Section 52. (*k*) Section 73.

for A., being seised in fee simple, to bargain and sell his lands for one year to B., and on receipt of any consideration, however small, B., under the Statute of Uses, without any actual entry, became possessed of an estate at law for one year. This being done, A. had merely to release by deed to B. and his heirs all his estate in the land, of which B. then became seised in fee simple.

This method was for over 200 years the common means of conveying lands. The St. Uses was employed only to give the lessee an estate at law without actual entry; the release operated at C. L. and must contain apt words for marking out the estate granted.

After the St. Frauds it was necessary that every bargain and sale should be in writing, as no pecuniary rent was ever reserved.

By an Act of 1841 it was provided that a deed of release should be effectual, although not preceded by a lease.

By the **R. P. A., 1845,** it was enacted that all corporeal tenements and hereditaments, as regards the conveyance of the immediate freehold, should be in grant as well as in livery. Since then a simple deed of grant has superseded all other methods of transfer.

Even after 1845, however, it was still possible to employ other methods of conveyance as, *e.g.*, feoffment with livery of seisin, or deed of bargain and sale enrolled under 27 *Hen. VIII. c.* 16, or release or confirmation. But nearly all these methods have long been obsolete and the **L. P. A., 1925** (*l*), provides that all lands and interests therein are to lie in grant and are to be incapable of being conveyed by livery of seisin or by feoffment or bargain and sale. Release and confirmation are still possible, and as to *confirmations* the **L. P. A., 1925** (*m*), provides that a deed executed after 1925 containing a declaration by an estate owner that his estate shall devolve in any manner requisite for confirming any interests intended to affect his estate and capable of subsisting as legal estates which, at some prior date, were expressed to have been transferred or created, and any dealings therewith which would have been legal if such interests had been validly transferred or created, shall, to the extent of the estate

(*l*) Section 51 (1). (*m*) Section 66 (1).

of the owner (but without prejudice to the restrictions) imposed by the Act in case of mortgagees), operate to give effect to such interests and dealings.

In such a deed there was, until recently, the same necessity as in case of a feoffment or release that the estate of the grantee should be marked out. But in deeds executed after 1881, by the **C. A., 1881,** it was sufficient to use the words "in fee simple," or "in tail male," or "in tail female," without the words "heirs," "heirs of the body," &c. But it was necessary to use either the old words, or the exact words of the Act must be used. A conveyance to A. simply, or even to A. "in fee," without more would still have given him merely a life estate. Now, however, by the **L. P. A., 1925** (*n*), a conveyance of freehold executed after 1925 without words of limitation passes to the grantee the fee simple or other whole interest of the grantor unless a contrary intention appears; but in the creating of an entailed interest in realty or personalty it is still necessary to use the words of limitation necessary at Common Law or permitted by the C. A., 1881.

On a grant of lands—unless a consideration is expressed in the conveyance—it was necessary that the conveyance should be made "unto *and to the use of*" the purchaser, otherwise the use, and by the Statute of Uses the legal estate, would *result* to the grantor. But now that the St. Uses is abolished the words "and to the use of" are unnecessary and their omission will not have this effect (*o*).

The St. Uses was often employed to avoid the rule that a man cannot make a conveyance to himself.

Thus, before 1882, if A. wished to convey freehold to himself and B. jointly, he could only do so in *one* instrument by conveying to B. and his heirs *to the use* of A. and B. and their heirs. Otherwise he must first convey to C., who would reconvey to A. and B. But by the **C. A., 1881** (*p*), freehold land might be conveyed *directly* by A. to A. and B. *jointly*. If, however, A. wished to convey to himself alone, *e.g.*, to convey a freehold estate to B., reserving a life interest to himself, he could still do this in one instrument only by the St. Uses, *e.g.*, by a

(*n*) Section 60 (1) (4). (*o*) L. P. A., s. 60 (3). (*p*) Section 50.

conveyance to B. and his heirs to the use of A. for life, and after his decease to the use of B. and his heirs. But by the repeal of the St. Uses this device has been made impossible and the **L. P. A., 1925** (*q*), while enacting this provision of the C. A., 1881, provides that after 1925 a person may convey land to or vest land in himself.

Registration.—To make a complete conveyance of lands in Middlesex or Yorkshire (including Kingston-upon-Hull) a memorial of the deed must by statutes of Anne and George II., be registered in the county register, but registration of an instrument made after 1925 is not necessary unless it transfers or creates a legal estate or creates a charge thereon by way of legal mortgage and the registration of an instrument not required to be registered will not effect any priority (*r*). By these Acts all deeds of conveyance were void against any subsequent purchaser or mortgagee who registered a memorial of the transfer to himself before registration of the first transfer. In equity, however, a person who so registered with notice of a prior unregistered assurance was a trustee of his legal estate for the first transferee.

This doctrine still prevailed in Middlesex until 1926, but by the **Yorkshire Registry Act, 1884,** registration was made optional, and all assurances had priority according to the date of registration, except in case of actual fraud, mere notice of a prior assurance having no effect.

Now, however, by section 197 of the **L. P. A., 1925,** the registration in a local registry of an instrument transferring or creating a legal estate or charge by way of legal mortgage constitutes notice of such transfer or creation to all persons and for all purposes, and the registration of an instrument not required to be registered does not operate as notice thereof.

By the L. T. A., 1897, it was provided that, subject to certain conditions, registration might, by Order in Council, be made compulsory in any county or part of a county, and necessary for the acquisition of the legal estate in freeholds. The provisions of this Act are repealed and re-enacted by section 120 of the **Land Registration Act, 1925,** under which an Order in Council

(*q*) Section 72.

(*r*) L. P. A., 1925, s. 11.

as respects any county or part of a county may be made at the instance of the County Council concerned and, after the expiration of ten years from January 1, 1926, without the concurrence of such County Council, but subject in certain circumstances to the holding of a public inquiry and to the approval by both Houses of Parliament of the Order in Council.

After 1925, where, as in the City and County of London, registration was made compulsory under the L. T. A., only estates capable of subsisting as legal estates may as a rule be registered (*s*). But, after 1925, in any such district, every conveyance on sale of freehold land and every grant of a term of years absolute for not less than forty years and every assignment on sale of land held for a term of years absolute of which not less than forty years is still to run, will, on the expiration of two months from the date thereof or of any authorised extension thereof, become void so far as concerns the grant or conveyance of the legal estate unless the grantee or his successor in title or assign has applied for registration (*t*).

Where land is situated within the jurisdiction of the Yorkshire or Middlesex registry and an estate therein is registered under the L. R. A., 1925, it becomes exempt, as respects such estate, from the jurisdiction of the local registry (*u*).

A *lease and release* was an *innocent conveyance*, the purchaser getting the fee by release, which never operated as of wrong, but simply passed the actual estate of the person making the release. The same applies to a deed of grant; in this the word "grant" is the proper term to employ, though other words may have the same effect (*x*).

Conveyances may also be made under *powers*, and, in case of registered land, by various statutory methods under the Land Transfer Acts and the Land Registration Act, 1925.

(*s*) L. R. A., 1925, s. 2.
(*t*) *Id.*, s. 123.
(*u*) *Id.*, s. 135.
(*x*) L. P. A., 1925, s. 51, re-enacting C. A., 1881, s. 49.

CHAPTER X.

OF THE DESCENT OF AN ESTATE IN FEE SIMPLE.

The personal representatives of a deceased man are (i.) *executors* appointed by his will; (ii.) *administrators* appointed by the Court on intestacy. In them the whole of the deceased's *personal estate* vests at law, their duty being to apply it in payment of debts and to dispose of the surplus according to the will or [before 1926] the St. Distributions or [after 1925] the Administration of Estates Act, 1925. To raise money for debts and legacies they have power to sell or mortgage any of the deceased's chattels, and their receipt is a good discharge to a purchaser or mortgagee, who need not inquire into the purposes of the sale.

Wills of personalty must be proved in the High Court, and the probate copy is the only *evidence* of the executor's right to administer the estate. But his *title* depends upon the will; he may, therefore, before probate do ordinary acts of administration for which evidence of his title is not required. The administrator's title is derived from the grant of letters of administration, which, however, relate back to the death. The letters of administration are the evidence of his title.

If one of several executors dies, the office survives to the rest. On death of a sole executor, his executor, if he has appointed one, becomes also executor of the first testator. But on death of a sole executor intestate or of an administrator, there must be a grant to an administrator *de bonis non administratis*. If a testator omits to appoint executors or if the executors whom he has appointed fail to take probate, an administrator *cum testamento annexo* must be appointed. If the sole executor is an infant, administration *durante minore ætate* is granted to his guardian or some person approved by the Court.

Where there are several executors or administrators they are regarded as one person, each has an equal and entire interest

over the whole personal estate, and the acts of one are deemed to be the acts of all (*y*).

Personalty specifically bequeathed passes to the executor, and does not vest in the legatee until the executor has assented, when it passes without any formality; before assent the legatee has merely a right to sue in equity for the administration of the estate and an equitable interest of which he can dispose, and which—if he dies before assent—will devolve upon his personal representatives.

Pecuniary and residuary legatees and persons entitled upon an intestacy have similar rights.

Realty at C. L. vested at once in the heir or devisee, but by the **Land Transfer Act, 1897,** real estate vested in any person *without a right in any other person to take by survivorship* was made to vest in his P. R. like a chattel real, notwithstanding any testamentary disposition. The P. R. were given the same powers over it as over a chattel real, save that—except by permission of the Court—all the executors *who proved the will* were required to concur in transferring real estate.

Realty was made liable to be administered for payment of debts and funeral expenses in the same way as personalty, but the order in which realty and personalty were formerly liable remained unchanged until the Administration of Estates Act, 1925 (see *post*, p. 57).

Subject to the above the personal representatives held the realty as trustees for the persons beneficially entitled.

As regards deaths after 1925, these provisions are substantially re-enacted by the **Administration of Estates Act, 1925,** which defines "real estate" as including (i.) chattels real and land in possession, remainder or reversion, and every interest in land to which a deceased person was entitled at his death; (ii.) real estate held on trust, or by way of mortgage or security, but not money to arise under a trust for the sale of land, nor money secured or charged on land (*z*). With respect to all such "real

(*y*) But, in the case of deaths after 1925, *chattels real* are "real estate," see A. E. A., 1925, s. 3 (*infra*).

(*z*) Section 3 (1). It also includes real estate passing under a gift contained in the will which operates as an appointment under a general power to appoint by will and also an entailed interest *disposed of* by will. *Id.*, s. 3 (2).

estate " the Act gives to the P. R. all the powers, duties, obligations and liabilities which before the Act were possessed by P. R. with respect to chattels real.

Accordingly, under the L. T. A., 1897, and the A. E. A., 1925, a man's real estate to which he was entitled for an interest not ceasing at his death, vests after his death in his P. R. in the same manner as a chattel real. Moreover, the Act of 1925 gives to the P. R. extensive powers of management over the real estate and provides that, for purposes of administration, or during the minority of any beneficiary, or the subsistence of any life interest, or until the period of distribution arrives, the P. R. shall not only have the same powers, including power to raise money by mortgage or charge, as they had formerly with respect to personal estate, but also all the powers of trustees for sale, including the powers of a life tenant under the Settled Land Act (*a*). But where there are two or more P. R. as respects real estate, a conveyance of real estate shall not (save as otherwise provided as respects trust estates, including settled land (*b*)) be made without the concurrence of all such P. R. or an order of the Court, except that where probate is granted to one or some of two or more executors the conveyance may be made by the proving executor or executors without the concurrence of the others or an order of the Court (*c*).

The **A. E. A., 1925,** further provides that where a person appointed executor renounces probate his rights in respect of the executorship shall wholly cease, and that where probate is granted to one or some of several executors all powers conferred by law on the P. R. may be exercised by the proving executor or executors; but an executor who has renounced probate may withdraw his renunciation and prove the will, without prejudice however to any intervening acts of any P. R. who has proved the will or taken out letters of administration (*d*). It also provides

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The Act of 1897 did not opply to trust or mortgage estates, which, however, devolved on the P. R. by 44 & 45 Vict. c. 41, s. 30, as amended by 57 & 58 Vict. c. 56, s. 88.

(*a*) A. E. A., ss. 33, 39.
(*b*) *Id.*, s. 13.
(*c*) *Id.*, s. 2 (2).
(*d*) *Id.*, ss. 5, 6, 8.

that representation may not be granted to more than four persons in respect of the same property, and that, if any beneficiary is an infant, or a life interest arises under a will, administration must be granted to a trust corporation, with or without an individual, or to not less than two individuals (*e*).

Subject to the powers given to the P. R. and to the liability of real estate for debts, &c., the title of the heir or devisee remained under the L. T. A., 1897, though he had merely an *equitable* estate in the lands descended or devised until the P. R. had conveyed them to him, or in the case of lands devised, had assented to the devise (*f*), and this is still the law with regard to persons dying before 1926.

But descent to the heir is now abolished (*g*), and the **Administration of Estates Act, 1925,** provides that on the death of any person intestate as to any real or personal estate such estate shall be held by his P. R. (i.) as to real estate upon trust for sale, and (ii.) as to personal estate upon trust to call in and sell such part as may not consist in money, with power to postpone such sale and conversion (*h*). Out of the money so arising, and any ready money of the deceased, the P. R. must pay the debts, &c., and then set aside a fund sufficient to provide for any pecuniary legacies, and distribute the residue according to the new rules applicable to intestacy (*i*). The position of a devisee is unchanged, and he may still require an assent or conveyance (*k*). A P. R. may also assent to the vesting in any person who may be entitled thereto of any estate or interest in real property to which the deceased was entitled or over which he exercised a general power of appointment by his will (including the statutory power to dispose of entailed interests (*l*)), and which devolved on the P. R., and the assent operates to vest in that person that estate or interest and, unless a contrary intention appears, relates

(*e*) A. E. A., s. 12. "Trust corporation" means either the Public Trustee or a corporation appointed by the Court, or entitled by rules made under the Public Trustee Act, 1906, to act as custodian trustee. *Ibid.*, s. 55.

(*f*) L. T. A., 1897, ss. 2, 3.

(*g*) *Ante*, p. 11.

(*h*) A. E. A., s. 33.

(*i*) *Post*, p. 57.

(*k*) A. E. A., s. 39.

(*l*) *Ante*, p. 29.

back to the death of the deceased. In order to pass the legal estate an assent must be in writing signed by the P. R., and must name the person in whose favour it was given; an assent or conveyance by a P. R. will not, except in favour of a purchaser of a legal estate for money or money's worth, prejudice the right of the P. R. or any other person to recover the estate or interest to which it relates, or to be indemnified out of such estate or interest against any duties, debt or liability to which it would have been subject but for such assent or conveyance, and a P. R. may, as a condition of giving an assent or conveyance, require security for the discharge of any such duty, &c., and may give an assent subject to any legal estate or charge by way of legal mortgage (*m*). If the P. R. fail to convey or assent within a year from the death the Court may, on the application of an heir or devisee, order a conveyance to be made (*n*).

We shall now consider the rules governing the descent of a fee. From 1833 to 1926 these rules depended on the Inheritance Act, 1833, and were based mainly on the principle of primogeniture, though in some cases, *e.g.*, in gavelkind land, land subject to the custom of borough English and copyhold land, special custom might indicate some one other than the eldest son as heir. Moreover, leasehold was regarded as personal property, and all personal property, subject to the rights of a widow or widower, went on intestacy not to the heir but to the next of kin. The Administration of Estates Act, 1925, has now enacted a new code of intestacy applicable to both real and personal estate, but it is still necessary to know the previous law.

A. The Law applicable to Intestacies before 1926:

1. The stock of descent is the *last purchaser*, *i.e.*, the last person taking otherwise than by descent, escheat, partition, enclosure: from him the lands descend to his issue *in infinitum*.
2. Male issue is admitted before female.
3. Where there are males of equal degree of consanguinity to the purchaser the *eldest* only inherits. Females of equal degree take all together as *coparceners*, so called because

(*m*) A. E. A., s. 36. (*n*) *Id.*, s. 43.

at C. L. they were the only joint tenants who could compel partition. There is no right of survivorship in coparcenary; the share of a coparcener descends like an interest in severalty (*o*).

4. All lineal descendants *in infinitum* of any person deceased represent their ancestor.

These four rules complete the descent of an estate *tail* (*p*) if not duly barred.

5. On failure of issue of the purchaser the inheritance goes to his nearest lineal ancestor.

6 and 8. Among ancestors the order is (i.) father and all male paternal ancestors of the purchaser and their descendants, the *nearest* taking first; (ii.) female paternal ancestors and their heirs, the mother of the *most remote* male paternal ancestor and her heirs taking first; (iii.) mother and male maternal ancestors and their descendants, the mother taking first, then the *nearest male* maternal ancestors and their descendants; (iv.) female maternal ancestors and their heirs, the mother of the *most remote* male maternal ancestor and her heirs taking first.

7. The half-blood of the purchaser, (i.) if the common ancestor is a male, inherit after the whole blood of the same degree; (ii.) if the common ancestor is a female, take after her.

9. If all heirs of the purchaser be dead the inheritance goes to the heirs of the *person last entitled*, *e.g.*, A. dies leaving an only son B. and no other relations; B. dies intestate and without issue; B.'s *maternal* relatives will inherit. (22 & 23 *Vict. c.* 35, *ss.* 19, 20.)

By the **Intestates' Estates Act, 1890,** where a man dies intestate and without issue his realty and personalty, if less than £500 in net value at the time of his death (*q*), vest in his widow absolutely. If more than £500 she is entitled to a first charge

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(*o*) Coparcenary is now possible only (i) in case of an entailed interest (*ante*, pp. 29, 30); (ii) where a lunatic of full age dies after 1925 (*ante*, p. 24).

(*p*) Except the special estate tail mentioned *ante*, p. 25, n. (*u*).

(*q*) *Re Heath*, [1907] 2 Ch. 270.

of £500 thereon, in addition to any other interest she may have in his real or personal estate.

B. The Law applicable to Intestacies under the Administration of Estates Act, 1925, ss. 46—49.

After payment of debts, &c., the residue must be distributed in the manner or held on the trusts mentioned below: —

1. If the deceased leaves a husband or wife (with or without issue) the survivor takes the personal chattels (*r*) absolutely, and the other residuary estate is charged with payment of £1,000 in his or her favour with 5 per cent. interest from the death. Subject as above the residuary estate is to be held (a) if there are no issue on trust for the surviving husband or wife for life; (b) if there are issue upon trust as to one half for the surviving husband or wife.

Subject to these rights of the surviving husband or wife the residue is to be held—

2. On trust for the children (if any) of the intestate upon the *statutory trusts*, *i.e.*, in trust, in equal shares, for all the children of the intestate who are living at the death of the intestate *and* attain the age of twenty-one or marry under that age; but if any child of the intestate predeceases him, leaving issue who are alive at the death of the intestate or attain twenty-one or marry under that age, such issue will stand in the place of their parent and take *per stirpes*:
3. If the intestate leaves no issue but both parents, on trust for the father and mother in equal shares:
4. If he leaves one parent, on trust for such surviving parent absolutely:
5. If he leaves no issue nor parent, on trust for the following persons, *if living at his death*, in the following order:—
   (i) For his brothers and sisters on the statutory trusts mentioned in (2);

(*r*) "Personal chattels" do not include chattels used for business purposes, nor money nor securities for money, section 55 (1).

(ii) For his brothers and sisters of the half blood upon similar statutory trusts;
(iii) For his grandparents in equal shares;
(iv) For his uncles and aunts (being brothers and sisters of the whole blood of a parent of the intestate) on similar statutory trusts;
(v) For his uncles and aunts (being brothers and sisters of the half blood of a parent of the intestate) on similar statutory trusts;
(vi) For the surviving husband or wife absolutely.

If none of the foregoing survives the intestate the Crown takes the whole of the residue, but may make provision for the dependants, whether kindred or not, of the intestate, and any other person for whom the intestate might reasonably have been expected to make provision.

CHAPTER XI.

OF A WILL OF LANDS.

Before Hen. VIII. land could not be devised, except by virtue of some special custom, as in the case of gavelkind and lands held in burgage in certain boroughs. Indirectly, however, a devise might be effected by conveying the land to such uses as the person conveying might appoint by his will. This was rendered impossible by the St. Uses, but by the Sts. Wills, 1540 and 1542, tenants in fee simple were given the power of devising all their land held in socage and two-thirds of that held by knight's service. By 12 *Car. II. c.* 24, which made socage the universal tenure, the right of devising freeholds became universal.

By the **Wills Act, 1837,** all estates and interests in real property which do not cease on the death of the person entitled thereto are devisable (*s*). By this Act no will is valid unless (a) it is in writing signed at the foot or end by the testator or some person in his presence or by his direction; (b) the signature

(*s*) Section 3.

is made or acknowledged by the testator in the presence of two or more witnesses *present at the same time*; (c) the witnesses have attested and subscribed the will in the presence of the testator (*t*).

No will which is not made in accordance with the Act is valid except (i.) wills of personalty complying with **Lord Kingsdown's Act, 1861,** and (ii.) informal wills of personalty or realty made by soldiers, sailors, &c., being on active service or at sea **(W. A., 1837, s. 11,** and **Wills (Soldiers and Sailors) Act, 1918)**: such informal wills are valid though made by minors, in exception to section 7 of the W. A., 1837, which provides that no will made by a person under twenty-one shall be valid.

By the St. Frauds, a bequest to a witness or his or her husband or wife rendered the signature of the witness invalid. Under the W. A., 1837, the signature is not invalid, but the *gift* is void.

Probate could not originally be granted of a will of realty alone; wills of realty and personalty required proof, but the probate was evidence only in respect of the personalty, the will itself being the only evidence in respect of the realty.

By the Court of Probate Act, 1857, the probate of a will was made admissible as evidence of a devise, and a devisee or heir might be cited to attend proceedings in the Court of Probate, and would be bound thereby. Since 1875 these provisions apply to proceedings in the High Court. The **Administration of Estates Act, 1925** (*u*), replacing a similar provision of the **L. T. A., 1897,** provides that probate may be granted in respect of real estate only.

A will may be *revoked* (1) by marriage, except (i.) when made in exercise of a power of appointment and the property appointed would not in default of appointment pass to the heir, next of kin or P. R. of the testator (W. A., 1837, s. 18); (ii.) a will made after 1925 expressly in contemplation of a particular marriage (L. P. A., 1925, s. 18); (2) by destruction *with intent to revoke* either by the testator or some person in his presence and by his direction (*x*); (3) by any writing executed in the same manner as a will and declaring an intent to revoke, or by a subsequent will

(*t*) Section 9.
(*u*) Section 13.
(*x*) W. A., 1837, s. 20.

or codicil (*y*). Alterations in a will are inoperative unless executed in the same manner as a will, the signatures of the testator and the witnesses being either made in the margin opposite the alteration or annexed to a memorandum referring to the alteration.

A will is revoked also as to property parted with by the testator during his life, unless it becomes his again before his death.

Before the W. A., 1837, a will of lands was considered as a *present* conveyance to come into operation at death. Hence, if a man after devising lands parted with them, they would not, if re-acquired by him, become subject to his will, unless it was republished or revived. But, by section 23 of the W. A., no subsequent conveyance prevents the operation of a will with respect to such devisable estate or interest as the testator has at his death.

By section 24, every will is to be construed with regard to the property comprised in it as taking effect from the date of the death unless a contrary intention appears. Hence *after-acquired* realty may now pass under a will. For the same reason a residuary devise formerly included only land not disposed of at the time of the will, but not *lapsed* devises. Now, unless a contrary intent appears, it includes devises which have lapsed, or failed to take effect (*z*).

Lapse occurs where a devisee dies in the lifetime of the testator, and cannot be prevented by the gift being made to the devisee and his heirs.

But by virtue of the W. A., 1837, no lapse occurs—

(a) In case of a devise of realty to any person for an *estate tail* where such person dies in the testator's lifetime leaving issue who could inherit under such entail. **S. 32.** After 1925 this rule applies also to a bequest of an entailed interest in personalty (*a*).

(b) In case of a devise of more than a life estate or interest in realty or personalty to a *child or other issue* of the testator who dies in the life of the testator leaving children who survive the testator. **S. 33.**

In both these cases the devise takes effect as if the death of

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(*y*) W. A., 1837, s. 21.
(*a*) L. P. A., 1925, s. 130.
(*z*) W. A., 1837, s. 25.

the devisee had happened immediately after that of the testator, unless a contrary intention appears by the will.

Construction of Wills.—The great maxim of construction is that the intention of the testator ought to be observed; but this is largely qualified by the numerous rules of construction which have been established. Further, where technical terms are employed, they are in general construed strictly.

Conversely, failure to use proper terms may defeat the intention of the testator; thus a gift of land without any words of limitation was formerly held to confer a mere life interest. In this case, however, it is provided by section 28 of the W. A. that where real estate is devised without words of limitation, it passes the fee simple or other the whole estate of the testator, unless a contrary intention appears.

By section 29 a further change was made. Previously, if lands were devised to A., and "in case he shall die without issue" to B., the Courts construed this as a gift of an estate tail to A. Now, unless a contrary intention is expressed by the will, such words are to mean only a failure of issue in the lifetime or at the death of A., and not an indefinite failure of issue unless a contrary intent appears by the will.

In this particular case the implication of an intent to confer an estate tail was excluded by statute. In other cases, however, it was frequently held that an intent to give the fee simple or an estate tail might be implied from the language of the testator. Thus a devise to a person and his "seed" or "issue" has been held to confer an estate tail. But now, by the **Law of Property Act, 1925** (*b*), an entailed interest can be created only by the same expressions as those by which before the Act a similar estate tail could have been created by *deed* in freehold land, and expressions which before 1926 could have created an estate tail by will but not by deed will operate in equity to create an absolute fee simple in realty and an absolute interest in personalty. And in the case of gifts over on failure of issue (*supra*) the same Act provides that where a person is entitled to (i.) an equitable interest in land not being an entailed interest; (ii.) any interest in other property not being an entailed interest with an

(*b*) Section 130.

executory limitation over on failure of issue, that limitation fails as soon as there is living any issue of the age of twenty-one of the class on default or failure of which the limitation was to take effect (*c*).

The doctrine of *uses* and *trusts* applied to wills as well as to conveyances, and provisions were made by the W. A., 1837 (*d*), for determining the estate taken by trustees.

Originally, executors had no control over a devise of real estate unless the testator had given them any estate in or power over the same, *e.g.*, a power to sell for payment of his debts. By Lord St. Leonards' Act (22 & 23 *Vict. c.* 35), trustees in some cases, and in others executors, were empowered to sell realty when the testator had *charged* it with his debts or legacies. These provisions are now rendered unnecessary in the case of deaths after 1897 by the L. T. A., 1897, and the Administration of Estates Act, 1925 (*e*).

The Middlesex and Yorkshire Registry Acts provided that wills of lands in those counties should be **registered** within six months of the death if the testator dies in the United Kingdom, or three years if he dies outside it, and that otherwise every devise by such will was void against any subsequent purchaser or mortgagee for valuable consideration (*f*). But in equity a purchaser or mortgagee with notice of a devise could not obtain priority by prior registration. By the **Yorkshire Registries Act, 1884,** wills of lands in Yorkshire *might* be registered and have priority according to the date of the death of the testator if registered within six months of the death, otherwise according to the date of registration (*g*). Similar provisions were made for the registration of an affidavit of intestacy.

(*c*) Section 134. Extending C. A., 1882, s. 10.

(*d*) Section 30, 31. The Statute of Uses did not "of its own force apply to wills, the Statute of Wills having been subsequently passed, but it was held that testators might employ the machinery of the statute for the purpose of manifesting their intention" (*Re Brooke*, [1894] 1 Ch. at p. 48; *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 478).

(*e*) *Ante*, pp. 52, 53. As to trust or mortgage estates, see *ante*, p. 52, n. (*z*).

(*f*) *Ante*, p. 49.

(*g*) See *ante*, p. 49.

Under the **L. P. A., 1925** (*h*), registration in a local registry of any instrument required by the Act to be registered constitutes actual notice thereof, and probates and letters of administration are to be treated as instruments capable of transferring a legal estate to P. R.

Death Duties.—The following duties are payable by persons who succeed through death to realty or personalty either upon intestacy or by will or under a settlement.

1. Succession Duty—payable by successors to any beneficial interest in realty or personalty, except personalty chargeable with legacy duty. The rate varies with the relationship of the successor, being (subject to certain exemptions) from 1 per cent. in case of lineal descendants, ancestors, and husband or wife to 10 per cent. in case of remote relatives and strangers. It is a debt due to the Crown from the successor and is a first charge on his interest.

2. Legacy Duty—payable by persons taking any personalty under a will, except leaseholds or legacies payable out of or charged on real estate, or the rent and profits or proceeds of sale or mortgage thereof, all of which pay succession duty. It is payable at the same rates as succession duty and subject to practically the same exemptions.

3. Estate Duty—payable on the principal value of all real or personal property passing on the death of any person and also on the principal value of any property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest. The rates vary from 1 per cent. on estates between £100 and £500 in value to 40 per cent. on estates over £2,000,000 in value. By the Finance Act, 1894, it was provided that where estate duty is leviable on any property which does not "pass to the executor as such" (as in the case of realty), a part of the estate duty, proportionate to the value of such property, is a first charge thereon, except as against a *bona fide* purchaser for value without notice.

Since 1925 the Commissioners of Inland Revenue may register any charge under any statute relating to death duties and unless

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(*h*) *Ante*, p. 49.

registered a purchaser of a legal estate for money or money's worth will take free therefrom (*i*).

CHAPTER XII.

OF CREDITORS' RIGHTS.

Liability for Judgment Debts.—Alienation of land for debts may take place either in the tenant's life or, in case of estates of inheritance, after his death. As regards **fee simple** lands, by the **St. Westminster II.** a creditor having obtained judgment might by a writ of *elegit* obtain one-half his debtor's lands in execution; and after so taking the lands in execution he might, and still may, hold them as tenant by *elegit* until the debt be satisfied out of the rents and profits.

Under this Statute it was held that a creditor might take out of the hands of a purchaser from the debtor one-half not only of lands sold after the judgment, but even of lands *acquired* and sold after the judgment. By the **Judgments Act, 1838,** *all* the debtor's lands might be taken under a writ of *elegit*, and it was expressly provided that this should extend to all lands acquired after judgment, and that the judgment should be a *charge* on such lands, but should not affect purchasers, creditors, or mortgagees, unless *registered* according to the Statute.

By the **J. A., 1864,** every creditor to whom any land of his debtor has been actually delivered in execution might obtain an order for its sale.

By the **Land Charges Act, 1888,** every writ or order affecting land and every *delivery in execution* was made void as against a *purchaser for value* unless the writ or order was registered in the Land Registry Office and re-registered every five years.

The effects of the J. A., 1838, and the L. C. A., 1900, are preserved by the **L. P. A., 1925** (*k*), and on registration of the writ or order the judgment operates as an equitable charge on every

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(*i*) L. C. A., 1925, ss. 10, 13; L. P. A., 1925, s. 17.
(*k*) Section 195.

estate or interest in land to which the judgment debtor at the date of registration or thereafter is entitled.

By the **L. C. A., 1900,** it was provided that a judgment should not operate as a *charge* on land unless a writ or order for enforcing it was registered under the L. C. A., 1888. Without such registration the judgment creditor does not acquire the statutory charge, although the lands have actually been delivered in execution. But on registration he acquires the charge at once, even though the writ registered be not actually executed. On the other hand, actual delivery in execution is necessary to obtain an order for sale under the J. A., 1864. And the actual delivery in execution under an unregistered writ or order is not void except as against purchasers for value (*l*).

Lands in Middlesex are subject to the L. C. A., 1925, which re-enacts similar provisions of the L. C. A., 1900, and registration in the Middlesex register is unnecessary (*m*), but by the effect of the **Yorkshire Registry Act, 1884,** an execution creditor should register his writ in Yorkshire to gain undisputed priority over any subsequent assurance.

Judgments of County Courts and other inferior Courts must be removed into the High Court before they can affect freeholds.

By the **Bankruptcy Act, 1914,** where a debtor is adjudged bankrupt the whole of his realty and personalty vests in the trustee in bankruptcy, who has a power to sell it and divide the proceeds among the creditors who have proved. And the bankruptcy relates back to the time of the act of bankruptcy on which the petition was founded, or to the first act of bankruptcy committed within three months before the petition, so that the trustee is in general entitled to all the property of the debtor at the time of such act. But, subject to certain provisions of the Act with regard to executions, attachments, settlements and preferences, bankruptcy does not invalidate any conveyance or assignment by the bankrupt for valuable consideration if made before the date of the receiving order and to a person without notice of any available act of bankruptcy (*n*). But by the

(*l*) L. C. A., 1925, ss. 6, 7. The term "purchaser" includes a mortgagee and lessee, and any one who, for valuable consideration, takes any interest in land or in a charge on land.

(*m*) L. C. A., 1925, s. 18.

(*n*) Bankruptcy Act, 1914, s. 45.

Land Charges Act, 1925 (*o*), unless a bankruptcy petition filed after 1925 is registered at the Land Registry it will not bind a purchaser of a legal estate in good faith for money or money's worth without express notice of the petition and without notice of an available act of bankruptcy, nor, as respects any transfer or creation of a legal estate, will an unregistered petition filed after 1925 be notice or evidence of any act of bankruptcy therein alleged. And any receiving order made after 1925 is also void as against such a purchaser unless registered (*p*). And the title of a trustee in bankruptcy is void as against such a purchaser, claiming under a conveyance after registration of the petition unless at the date of the conveyance either the registration of the petition is in force or the receiving order is registered (*q*). These provisions of the L. C. A. protect only the purchaser of a legal estate, but the purchaser of an equitable interest may be protected under section 45 of the Bankruptcy Act, 1914 (*r*), unless the petition is registered, in which case he is deemed to have notice of it and of any act of bankruptcy that has been committed (*s*).

Any real estate acquired by or devolving on a bankrupt before his discharge also vests in the trustee, but all transactions by a bankrupt with any person dealing with him *bonâ fide* and value in respect of such after acquired property are valid against the trustee if completed before any intervention by the trustee (*t*). Similarly when a debtor enters into a *composition* or *scheme of arrangement* with his creditors under the bankruptcy laws his realty may by its terms be vested in the trustee appointed thereunder.

If a debtor enters any *private* deed of arrangement with his creditors and assigns his property for their benefit *generally*, the assignment is void unless made in accordance with the **Deeds of Arrangement Act, 1914,** and is also void against a purchaser for value of any land comprised therein, unless also registered in the debtor's name in the Land Registry Office under the **L. C. A., 1925** (*u*).

(*o*) Section 3.
(*p*) L. C. A., 1925, ss. 1, 7.
(*q*) *Id.*, s. 3.
(*r*) *Ante*, p. 65.
(*s*) L. P. A., 1925, s. 198.
(*t*) Bankruptcy Act, 1914, s. 47.
(*u*) Sections 1, 9, 20, replacing similar provisions of the L. C. A., 1888.

Fee simple estates are also subject **after death** of the tenant to his debts contracted in life. From Edw. I. the rule was established that where a debtor had by deed under seal (termed a *special* contract or *specialty*) bound his heirs with payment of any debt, the heir was liable to pay the debt to the extent of the value of any lands descended to him from his ancestor. Such lands were called *assets by descent.*

Apart from this creditors could only obtain payment out of lands where the debtor had by his will made them subject to his debts (*x*). In such cases the land was termed *equitable assets*, and the Courts of Chancery allowed simple contract creditors to share equally with specialty creditors in the proceeds.

A debtor might, however—even if he had bound his heirs by specialty—defeat his creditors by devising lands to some person other than his heir. In this case the creditors originally had no remedy, but by the **Sts. Fraudulent Devises** (3 *W. & M. c.* 14, 11 *Geo. IV. & 1 Will. IV. c.* 47), all such devises were made void against creditors by specialty in which the heirs were bound.

By the **Administration of Estates Act, 1833** (3 *& 4 Will. IV. c.* 104)—extending the provisions of an Act of 1807 which applied only to traders—all estates in fee simple which the owner had not by his will charged with or devised subject to payment of debts were made equitable assets, available for all creditors alike. But the order in which assets were liable for debts was unchanged, and the personal estate remained primarily liable; the effect of an actual charge or devise for payment of debts also remained the same.

Under this Act specialty creditors had priority over simple contract creditors, but this was taken away by **Hinde Palmer's Act, 1869** (32 *& 33 Vict. c.* 46).

Under the **L. T. A., 1897,** realty was made liable to be administered in the same manner as personalty, but the order of application was unaltered, and the effect of a charge on realty remained the same.

As regards persons dying after 1925, the foregoing enactments are repealed by the **Administration of Estates Act, 1925,** under which both real and personal estate vest in the P. R. (*ante*,

(*x*) *Ante*, p. 62.

p. 54) and, in spite of any contrary testamentary disposition, are assets for the payment of both specialty and simple contract debts and may if necessary be administered for that purpose by the Court (*y*).

The following is the **order in which assets are applied for the payment of debts** where the estate is solvent:—

(1.) Property undisposed of by will subject to the retention thereout of a fund sufficient to meet any pecuniary legacies;

(2.) Property not specifically devised or bequeathed but included in a residuary gift, subject to the retention thereout of a fund sufficient to meet pecuniary legacies so far as not provided for as aforesaid;

(3.) Property specifically appropriated or devised or bequeathed for the payment of debts;

(4.) Property charged with, or devised or bequeathed subject to a charge for the payment of debts;

(5.) The fund, if any, retained to meet pecuniary legacies;

(6.) Property specifically devised or bequeathed, rateably according to value;

(7.) Property appointed by will under a general power, including the statutory power to dispose of entailed interests, rateably according to value. This order may be varied by the will of the deceased, and land is still liable to answer its own death duties in exoneration of other assets (*z*).

The remedies of a creditor on the death of his debtor are either to sue the personal representatives at law, and obtain judgment against the goods of the deceased, or to apply for the administration by the Court of the debtor's estate. A specialty creditor might also sue the heir or devisee for the debt, and, perhaps, under the L. T. A. and A. E. A. any creditor may sue the personal representative and obtain execution out of the debtor's lands.

Under the Bankruptcy Act, 1914, a creditor or the deceased's personal representative might, if the deceased was insolvent, obtain an order to have the estate administered *in bankruptcy*; this provision is, however, repealed as from January 1, 1926 (*a*).

(*y*) 15 Geo. 5, c. 23, s. 32.
(*a*) *Id.*, s. 56.
(*z*) *Id.*, s. 34, Sched. 1, Part. II.

Crown Debts.—A Crown debtor's freeholds in fee simple may be seized in the hands of himself, his heirs or devisees. Formerly Crown debts, with some exceptions, formed a charge on the lands of the debtor, but they were made subject to the L. C. Acts, 1888 and 1900; and now, by the **L. P. A., 1925** (*b*), no judgment, recognisance or debt to the Crown operates as a charge on land unless a writ or order for enforcing it is registered at the Land Registry and, by the **L. C. A., 1925** (*c*), any such writ or order and any execution pursuant thereto is void as against a purchaser (*d*) unless the writ or order is duly registered.

By the **L. P. A., 1925** (*e*), replacing 13 *Eliz. c.* 5, every conveyance of property made with intent to defraud creditors is voidable at the instance of any person prejudiced; but this provision does not extend to any conveyance for valuable consideration and in good faith, or upon good consideration and in good faith to a person not having notice of the fraudulent intent. Such conveyances are therefore of no avail against executive creditors or a trustee in bankruptcy or a creditor seeking to obtain payment out of the debtor's estate after his death.

Fraudulent conveyances of property are also void as against a trustee in bankruptcy; and, by the Bankruptcy Act, 1914 (*f*), provisions are made for the avoidance of *voluntary settlements* on the subsequent bankruptcy of the settlor, protection being, however, given to a *bonâ fide* purchaser for value from a beneficiary under the settlement.

Estates tail could not originally be held under a writ of *elegit* for longer than the life of the tenant in tail against whom the judgment was obtained. But by the **J. A., 1838,** a judgment was made a charge on the lands as against the issue of the body of the debtor and any person whose interest he might have barred without the consent of any other person. Estates tail were governed by the J. A., 1864, and the L. C. Acts, 1888 and 1900, and the L. C. A., 1925, re-enacts the foregoing provision of the J. A., 1838, but as in the case of a fee simple the judgment does not operate as a charge until a writ or order for enforcing it

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(*b*) Section 195.
(*c*) Section 7.
(*d*) *Ante*, p. 65, n. (*l*).
(*e*) Section 172.
(*f*) Section 42.

has been registered (*g*); and, under the L. C. A., 1925 (*h*) the actual delivery in execution of an entailed interest is void against purchasers for value unless the writ or order is duly registered. An estate tail may also be barred and disposed of upon bankruptcy to the same extent as it might be for the debtor's own benefit. But if the debtor die before any judgment creditor has acquired a charge on his lands and without having been adjudged bankrupt and not being insolvent, the lands could not hitherto be made available to creditors except in case of certain Crown debts; after 1925, however, this does not apply to an entailed interest disposed of by will (*i*).

A **life estate** may be taken during the life of the life tenant, just as an estate in fee simple, and will vest in his trustee in bankruptcy; but it is not available after his death. Determinable life estates are not subject to the tenant's debts after their termination. Estates *pur autre vie* are liable to alienation for debt during life like other freeholds, and after his death continue liable for his debts during remainder of the life of the *c. q. v.* After 1925, however, all life interests are equitable.

Equitable Interests.—(i.) Creditors may, under the **J. A., 1838,** obtain execution of all lands of which any person is seised or possessed in trust for the debtor at any time before or after judgment; (ii.) where the legal remedy by *elegit* is impossible they may obtain *equitable execution, i.e.*, the appointment by the Court of a receiver of the rents and profits of the debtor's equitable estates (*k*).

Equitable interests were also governed by the J. A., 1864, and the L. C. Acts, 1888 and 1900, and are now governed by the L. P. A., 1925, and the L. C. A., 1925 (*l*). They can also be made available in bankruptcy in the same way as legal estates. Trust estates in fee simple descending to the heir were made *assets by descent* by the St. Frauds, and are now governed by the same statutes as legal estates and liable to the same extent for debts after death.

(*g*) Section 195. (*h*) Sections 6, 7, *ante*, p. 65.

(*i*) *Ante*, pp. 29, 30.

(*k*) See *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275; *Salt* v. *Cooper*, 16 Ch. D. 544.

(*l*) *Ante*, pp. 64, 65.

Trust estates are subject to Crown debts in the same way as estates at law. And in the case of equitable estates tail and for life the liability is the same as that of similar estates at law.

Lis Pendens.—Actions respecting lands bind a purchaser as well as the tenant's heir or devisee although he is ignorant thereof. But by the J. A., 1839, it was provided that no *lis pendens* should bind a purchaser or mortgagee unless duly registered. The law on this subject is now consolidated by the **Land Charges Act, 1925,** which provides that a register of pending actions shall be kept at the Land Registry. It is therefore necessary, before any purchase or mortgage of freeholds, to search in the Land Registry Office for writs and orders issued for enforcing judgments, orders appointing receivers, receiving orders in bankruptcy, pending actions and petitions in bankruptcy, which must be got rid of before the sale or mortgage is completed.

CHAPTER XIII.

OF PERSONAL CAPACITY.

All natural persons are capable of purchasing and holding lands, and, as a general rule, of disposing of or making contracts with regard to land. To this rule there are, however, certain exceptions.

Infants.—An infant cannot, after 1925, hold a *legal* estate in land. The purchase of land by an infant is *voidable* within a reasonable time after his coming of age, but remains good until repudiated (*m*). A conveyance by an infant—except when made by feoffment before 1925 under the custom of gavelkind—is also as a rule *voidable*. But by the effect of the **Infants' Relief Act, 1874,** a conveyance by an infant of land or goods by mortgage to secure repayment of money lent is *void*.

By the **Infants' Settlement Act, 1855,** a male not under twenty and a female not under seventeen may, with the sanction

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(*m*) See *Edwards* v. *Carter*, [1893] A. C. 360; *Thurstan* v. *Nottingham, &c., Bdg. Socy.*, [1903] A. C. 6.

of the Chancery Division, make a binding settlement of any property in consideration of marriage (*n*).

An infant's contract to purchase land is *voidable*.

During an infant's minority the custody of his estate is with his **guardians** *in socage* (*o*) or *by statute*. The latter were created by 12 *Car. II. c.* 24, which on abolishing military tenure took away the right of wardship from the lords and gave the father the right of appointing by deed or will guardians to his children who were under age and unmarried.

By the **Guardianship of Infants Act, 1925** (*p*), on the death of the father of an infant the mother is guardian either alone or jointly with any guardian appointed by the father or the Court; the converse also applies on the death of the mother. The father or mother of an infant may by deed or will appoint a person to be guardian after his or her death, and such person will act jointly with the surviving parent. If, however, the surviving parent objects to his so acting, or if such guardian thinks that the surviving parent is unfit to have custody of the infant, he may apply to the Court which may refuse to make any order, when the surviving parent will remain the sole guardian, or may order the person appointed guardian to act jointly with the parent or to be sole guardian, and in the latter case may make such order as it thinks fit regarding the custody of the child and the access of the parent and may order the parent to pay a weekly sum for the maintenance of the child. If guardians are appointed by both parents they act jointly. If a guardian is appointed by the Court to act jointly with a surviving parent he continues to act after the death of such parent, but if the surviving parent has appointed a guardian, the guardian appointed by the Court acts jointly with the former.

Where these statutes do not apply the old law of wardship in socage remains. Guardians may also be appointed by the Chancery Division under its general jurisdiction.

The proper method of giving an interest in land to an infant

(*n*) This power still exists, provided that a legal estate in land is not to vest in an infant, S. L. A., 1925, s. 27.

(*o*) *Ante*, p. 7.

(*p*) Section 4.

by an instrument operating *inter vivos* after 1925, is by a settlement or trust for sale, the legal estate being vested in trustees (*q*); if no trust for sale is created, any instrument under which land stands limited in trust for an infant in possession in fee simple constitutes a settlement (*r*); any attempt by conveyance *inter vivos* to convey a legal estate to an infant operates only as an agreement for valuable consideration to execute a settlement in favour of the infant and in the meantime to hold the land on trust for the infant (*s*); a conveyance of a legal estate to an infant jointly with a person of full age vests the legal estate in such other person on the *statutory trusts*, *i.e.*, on trust for sale for the benefit of the infant and such other person as joint tenants in equity (*t*); a grant or transfer of a legal mortgage of land to an infant similarly operates merely as an agreement to execute a proper conveyance when the infant attains full age, but where such grant or transfer is to the infant and a person of full age it will operate as if the infant were not named therein, but without prejudice to any beneficial interest in the mortgage debt intended to be provided for the infant (*u*).

Where, immediately before January 1, 1926, an infant was beneficially entitled to land in possession for an estate in fee simple or for a term of years absolute, or would, if of full age, have been a tenant for life or have the powers of a tenant for life, the settled land on that date vested in the trustees of the settlement or, if there were no such trustees, in the Public Trustee, on such trusts as might be necessary to protect the rights of the infant and any other person interested (*x*). Where, however, the legal estate was before that date vested in an infant jointly with a person of full age, the legal estate vests in such other person upon the statutory trusts (*y*).

Contracts of a person who is **insane** or too **drunk** to under-

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(*q*) L. P. A., 1925, s. 28.
(*r*) S. L. A., 1925, ss. 1, 2.
(*s*) *Id.*, s. 27.
(*t*) L. P. A., 1925, ss. 19, 35.
(*u*) *Ibid.*, s. 19.
(*x*) S. L. A., 1925, s. 37, 2nd. Sched., para. 3
(*y*) L. P. A., s. 39, 1st Sched., Part III. (2).

stand their effect are *voidable* if the other party knew of his condition (*z*). A voluntary conveyance of land by a person of unsound mind is *void*, if for valuable consideration it is *voidable* if the other party knew of his condition; otherwise it is valid. A voluntary conveyance by a drunkard may be confirmed when sober; if for valuable consideration the same rules apply as in the case of a person of unsound mind.

The care of the property of **idiots** and **lunatics** is by the **Lunacy Act, 1890,** and the **Trustee Act, 1925** (*a*), given to the Judge in Lunacy and entrusted to the *committee* of their estates or such other person as the judge may appoint. And by the Law of Property Act, 1925 (*b*), provisions are made for enabling a legal estate to be conveyed or created in the name of a lunatic; and by the same Act the Court may direct a settlement to be made of the property of a lunatic on such trusts as the Court may deem expedient.

Convicts are, by an Act of 1870, incapable of alienating or charging any property or making any contract, unless they are lawfully at large under a licence. An administrator of any convict's property may be appointed, in whom all his property will vest, revesting in the convict or his personal representatives on his pardon, completion of his punishment, death, or bankruptcy. By the Trustee Act, 1925 (*c*), property vested in any person on trust or by way of legal mortgage is not affected by his becoming a convict.

Aliens were formerly under incapacities, but by the **British Nationality and Status of Aliens Acts, 1914 and 1918,** may acquire, hold and dispose of every species of property in the same way as a natural-born British subject.

Corporations are fictitious bodies invested with the attributes of persons and having corporate names by which they can sue or be sued and hold property, but enjoying immortality through the perpetual succession of their members. Corporations were at C. L. under no incapacity, but by the Sts. Mortmain (*d*) are in

(*z*) *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599.
(*a*) Sections 44, 49, 50-52, 54.
(*b*) Sections 22, 171.
(*c*) Section 65.
(*d*) *Ante*, p. 21.

general unable to hold lands except by licence from the Crown or statutory authority. Thus every joint stock company under the Companies Acts has power to hold lands, but no company formed for science, charity, &c., or any other object not involving the acquisition of gain, may hold more than two acres without the consent of the Board of Trade. The capacity of a corporation to alienate lands depends upon its nature; many public and charitable corporations, *e.g.*, those subject to the Municipal Corporations Act, 1882, are restrained by statute from disposing of their lands.

Corporations created for specific purposes, *e.g.*, railway companies, cannot deal with their corporate property except for the purposes for which they were created. The capacity of a corporation to contract with respect to land is commensurate with its power of disposing of land.

Since 1899 a corporation may hold property in joint tenancy; formerly a gift that would have rendered a natural person a joint tenant rendered a corporation a tenant in common.

CHAPTER XIV.

THE MUTUAL RIGHTS OF HUSBAND AND WIFE.

At C. L. husband and wife became by marriage one person. The husband became entitled to the whole of the rents and profits of the wife's land and acquired a freehold estate therein during coverture. He also acquired the absolute property in her goods and chattels and a joint seisin of her freeholds. Further, if he had issue by his wife *born alive that could possibly inherit her estate*, he had after her death for the remainder of his own life an estate by the **curtesy** in all the lands and tenements of which his wife was *solely seised* in fee simple or in fee tail *in possession*. [In gavelkind, the right extended to only one-half the wife's land and ceased on the husband's remarriage.]

The husband could, without the consent of the wife, dispose of the estate which he took by coverture or curtesy, and it was subject to his debts in his life. But he could make no disposition

of her freeholds to endure beyond his own interest; if the wife survived, she resumed her rights, which could not be defeated by his debts, or alienations.

If the husband survived, the wife's estates of inheritance descended to her heir or the heir of the purchaser, subject to the husband's estate by curtesy; she could make no disposition of them by will. As tenant by the curtesy, the husband now has the powers of leasing and sale given to a life tenant by the Settled Estates Act, 1877, and the S. L. A., 1925 (*e*). But with regard to the property of a wife dying after 1925, tenancy by the curtesy and every interest of a husband in real estate as to which his wife dies intestate are abolished (*f*) except where the wife is tenant in tail and dies without having barred the entail or disposing of the entailed interest by her will, in which cases the entailed interest will devolve as an equitable interest upon the persons who, before 1926, would have been entitled as heirs of the body or tenant by the curtesy (*g*).

Husband and wife *together* might make any disposition of the wife's interest in realty which she could make if unmarried. Formerly this was effected by a *fine*, the wife being separately examined to ascertain if she was acting of her own free will. By the **Fines and Recoveries Act, 1833,** a conveyance of freehold might be made by a married woman by a *deed* executed with her husband's concurrence and *acknowledged* by her before a judge of one of the superior Courts, or of any County Court, or a Master in Chancery, or two commissioners, who were required to examine the wife separately as before the Act. After 1882 an acknowledgment before one commissioner was sufficient (*h*).

Without a fine at C. L., or a deed acknowledged under the Act of 1833, no conveyance could formerly be made of any married woman's estate at law (*i*). And this remained the law with regard to those lands of women married before 1883 to

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(*e*) Section 20, replacing similar provisions of the S. L. A., 1882.
(*f*) A. E. A., 1925, s. 45.
(*g*) L. P. A., 1925, s. 130.
(*h*) C. A., 1882, s. 7.
(*i*) But a married woman might be given a *power of appointment* enabling her to dispose of an estate in land (*post*, pp. 93, 95).

which their title accrued before 1883. But by the C. A., 1911, s. 7, the Court might, by judgment or order, bind a wife's interest in any property which she was by law unable to dispose of or bind. This is re-enacted by the **Law of Property Act, 1925** (*k*), which also provides (*l*) as regards deeds executed after 1925 that every disposition of real or personal property which a married woman is authorised to make by deed acknowledged shall be effectual if made with the concurrence of her husband, and that acknowledgment and separate examination are unnecessary.

At C. L., if lands were given to A. and B. (husband and wife) and C., a third person, and their heirs, A. and B., being one person, took only one-half, and not two-thirds, as joint tenants with C. And this rule still survives. So also if land was given to A. and B. (husband and wife) and their heirs, they took not as joint tenants but by **entireties**; neither without the consent of the other could dispose of any part of the inheritance; unless they concurred in a disposition of it the survivor took the whole. But after 1925 all tenancies by entireties are converted into joint tenancies and as regards interests in property acquired under a disposition taking effect after 1925, husband and wife are two persons (*m*).

Again, at C. L. a man could not convey to his wife, but under the St. Uses he might convey to a third person to the *use* of his wife. And by the L. P. A., 1925 (*n*), replacing the C. A., 1881, freehold may be conveyed by a husband or wife to the other either alone or jointly with any other person.

A man has always been able to devise lands to his wife.

In equity, if lands were held in trust for a wife for life or in fee simple or fee tail, but without a proviso for her separate benefit, the husband was entitled to receive the rents and profits, and acquired an equitable estate therein during coverture, subject to the wife's right in equity to have provision for her maintenance secured by a settlement of the rents and profits, or some part of them, in trust for that purpose. He also had the right to curtesy out of the wife's equitable estates of inheritance.

(*k*) Section 7.
(*l*) Section 157.
(*m*) L. P. A., 1925, s. 36.
(*n*) Section 72.

The wife's equitable estates could only be disposed of by both together in the same way as her legal estates.

In modern times, if property was vested in trustees on trust to apply the income for the *separate use* of a woman during coverture, the Courts of Equity obliged the trustees to hold such income for the sole benefit of the wife, who enjoyed the same powers of disposition over it as if she were unmarried.

If the income of property was given directly to the wife for her separate use without any trustees, the Courts of Equity compelled the husband to hold his rights in the income as trustee for the wife.

The Courts further allowed property settled to the separate use of a married woman to be so tied down that she should have no power during coverture to anticipate or assign the income. When property was subject to this **restraint upon anticipation,** any attempted disposition during coverture of the *corpus* or of income *not yet accrued due* was held void.

Not only income, but also the *corpus* of any property, might be settled to a wife's separate use. And in 1865 it was settled (*o*) that a gift of realty to a wife's separate use, with or without trustees, gave her power, without consent of her husband, to dispose of her whole *equitable* estate therein. This rule had been long established with regard to personalty. If the lands were vested in trustees for her separate use, she could require the trustees to convey the *legal* estate according to her directions; if there were no trustees, she conveyed by deed acknowledged, in which her husband was compelled to concur.

Also, if a wife made contracts with respect to her separate estate, her creditors in equity might have their claims satisfied out of any property which, at the time of making the contract, she was not restrained from anticipating.

It was finally settled that a husband should have **curtesy** out of the wife's separate equitable estates in fee if she died possessed thereof and intestate, but not if she disposed thereof in her life or by will.

Statutory Separate Property.—Originally a wife could have separate property only by act of parties, *e.g.*, by the express

(*o*) *Hall* v. *Waterhouse*, 5 Giff. 64.

provision of those by whom the property was bestowed. The **Married Women's Property Act, 1870,** however, provided that certain kinds of property should always belong to wives for their separate use, and the **M. W. P. Act, 1882,** completely altered the capacity of married women by providing—

(1) that every married woman shall be capable of acquiring, holding, and disposing of any property as if she were a *feme sole*, without the intervention of any trustee **(Section 1)**;

(2) that every woman married *after* the Act is entitled to hold and dispose of as her separate property all property belonging to her at the time of marriage or acquired by or devolving upon her after marriage **(Section 2)**;

(3) that every woman married *before* the Act is entitled to hold and dispose of as her separate property all property to which her title has accrued after the Act **(Section 5)**;

But the Act is not to interfere with any settlement nor to affect any restraint upon anticipation **(Section 9).** Now, however, under the **Law of Property Act, 1925** (*p*), a married woman's interest in property which is restrained from anticipation may, when it appears to be for her benefit, and with her consent, be bound by judgment or order of the Court.

The Act of 1882 (*q*) also gave married women the power to contract at law with respect to their separate property to which they are entitled without restraint on anticipation.

If real estate, which by this Act is the separate property of a wife, is limited to her directly, the legal estate vests in her alone, and the husband does not acquire any right or estate therein. And now, if realty is limited to trustees on trust for a wife, her *equitable* estate therein is her separate property, although no trust for her separate use has been imposed. Subject to the L. T. A., 1897, the husband may still have curtesy of the wife's separate property as to which she died intestate before 1925.

A wife may now dispose during coverture of her statutory separate property in the same way as a single woman without the necessity of acknowledgment or of her husband's concurrence—

(*p*) Section 169, re-enacting section 7 of the C. A., 1911.

(*q*) Section 1 (amended by section 1 of the M. W. P. A., 1893).

unless she is restrained from anticipation. But by the **Settled Land Act, 1925** (*r*), any instrument, whether made before or after January 1, 1926, by which land, after that date, stands limited to or in trust for a married woman of full age in possession for an estate in fee simple, or a term of years absolute, with a restraint on anticipation, is for the purposes of the Act a settlement, and the married woman has the powers of a life tenant under the Act.

A wife may devise any legal estate in fee simple which is her separate property under the Act.

It was held that the Act did not repeal the old rule of construction that in gifts to husband and wife and a third person the husband and wife took only one half, though after the Act they took not by entireties but as joint tenants: but under a disposition taking effect after 1925 husband and wife are treated as two persons (*s*).

A husband may now convey any real estate to his wife directly as her separate property and a wife may convey to her husband any real estate held by her as her separate property (*t*).

Under the Settled Land Act, 1925 (*u*), a married woman of full age may, after 1925, exercise the powers of a life tenant under the Act without her husband whether or not she is entitled to her interest as her separate property, and a restraint on anticipation will not prevent her exercising her powers.

Where a married woman was a trustee of land, she could not before 1907, unless she was a bare trustee, convey the legal estate except by deed acknowledged in which her husband must concur. This was altered by the M. W. P. A., 1907, and now the **Law of Property Act, 1925** (*x*), enacts that a married woman can hold and dispose of any interest in real or personal property as a trustee or P. R. as if she were a feme sole.

(*r*) Section 1.

(*s*) *Ante*, p. 77.

(*t*) L. P. A., 1925, s. 72.

(*u*) Section 25, replacing section 61 of the S. L. A., 1882.

(*x*) Section 170. This section applies to a woman who was married after 1882, or who, being married before 1883, became a trustee or P. R. after 1882, and confirms all acquisitions and dispositions made after 1882. But any title or right acquired through or with the concurrence of the husband, before 1908, prevails over any title or right which would otherwise have been rendered valid by the section or any enactment which it replaces.

Rights of Wife in Husband's Lands.—During the husband's life the wife obtained no interest in his land, but at his death she became in some cases entitled to a life interest in part thereof. Before the Dower Act, 1833, if at any time during coverture the husband was *solely* seised of a *legal* estate of inheritance in possession in lands to which any issue which the wife *might* have had *might* have been heir, she was entitled at his death to have one-third (*y*) of the lands allotted to her to be enjoyed in severalty during the rest of her life. This right having once attached to lands, was independent of the husband's debts, and could not be defeated by any sale or devise by him unless the wife concurred therein and released her right. At C. L. this release could be effected only by *fine*, but under the Fines and Recoveries Act by *deed acknowledged*.

Dower might be prevented from attaching to newly-purchased lands by means of "*uses to bar dower*," *i.e.*, the purchaser taking a conveyance upon such *uses* that he could never become seised of an estate to which it would attach.

The right might also be barred by the wife's acceptance before marriage of a **jointure** in lieu of dower. *Legal* jointure was first authorised by the St. Uses, under which dower might be barred by the wife's acceptance *before* marriage, and in satisfaction of dower of a competent livelihood of freehold, to take effect in profit or possession presently after the death of the husband for at least the life of the wife. If jointure was made after marriage, the wife must elect between jointure and dower. If, however, the wife was of full age and a party to the settlement, she might *in equity* extinguish her title to dower on any terms.

By the **Dower Act, 1833,** no widow is entitled to dower out of any land disposed of by the husband in his life or by will, or in which he has devised any estate or interest for her benefit, unless a contrary intent appear by the will. And all interests and charges created by the husband, and all debts and incumbrances, are effectual to bar dower. He may also bar dower by any declaration or deed or by will; but the wife is given a right to dower out of lands to which the husband had merely a right and no legal seisin, and out of equitable estates except those of which he was joint tenant.

(*y*) In gavelkind her right was to one-half while unmarried and chaste.

The effect of the Act was to deprive the wife of her dower except as against the heir at law.

A tenant in dower has the powers of leasing given to a life tenant under the Settled Estates Act, 1877, but not the powers given under the S. L. A., 1882.

As regards the estate of any person dying after 1925 the **Administration of Estates Act, 1925** (*z*), abolishes dower and every interest of a wife in real estate as to which her husband dies intestate.

CHAPTER XV.

OF REVERSIONS AND VESTED REMAINDERS.

Reversions and Vested Remainders.—If A., being tenant in fee simple, grants to B. a less estate than his own, *e.g.*, a lease for life or for years, or an entailed interest, he disposes of a *particular* estate, *i.e.*, a part of his estate in fee, and, accordingly, on the expiration of the term of years, or the death of the life tenant, or the decease of the donee in tail without having barred the entail, the possession of the land will revert to A. or (before 1926) his heirs, or (after 1925) his P. R. During the continuance of the particular estate the interest of A. is termed a **reversion.** If A., having granted a particular estate to B., at the same time grants all or any part of his reversion to C., the estate so granted is termed a **remainder.** A remainder arises by express grant; a reversion simply by act of law.

A Reversion on a Lease for Years.—Before 1926 a reversion might exist either as a legal or equitable estate. Now, however, since the only legal estates that can exist are a fee simple absolute in possession and a term of years absolute (*a*), a reversion, *except a reversion arising in consequence of the grant of a term of years*, can only be an equitable estate. The exception is due to the C. L. principle that where A., being tenant in fee simple, granted only a term of years, he did not part with his feudal possession, the lessee being regarded merely as his

(*z*) Section 3.

(*a*) *Ante*, p. 12.

bailiff (*b*). A. might, therefore, before 1926 convey his reversion by feoffment with livery of seisin; but, as he parted with the actual possession, his estate was strictly incorporeal, and might therefore also be granted by deed; if, however, A. granted a lease for life, *that* being an estate of freehold, he parted with his seisin, and his reversion being purely incorporeal, could be conveyed only by deed of grant; but, as regards conveyances after 1925, this distinction has lost importance since lands and all interests therein now lie in grant (*c*).

In the case of a lease for years, upon entry by the lessee, tenure—though not strictly free tenure—exists; the **rent** reserved is *rent service*, and is recoverable by distress like rent due from a freeholder. For reservation of rent service a deed was formerly not necessary; but, by the R. P. A., 1845, re-enacted as regards leases after 1925 by the L. P. A., 1925, s. 52, a lease which is required by law (*d*) to be in writing is void unless made by deed.

The C. L. remedy of **distress** was merely by seizing and impounding foods of the tenant or any other person found on any part of the premises; *sale* of goods seized was first authorised by 2 *W. & M. c.* 5. By the **Law of Distress Amendment Act, 1908,** the goods of undertenants, lodgers, and others are protected. The remedy of distress belongs to the landlord at C. L. without express agreement, as also his right to sue the tenant personally for the rent. Under the **Increase of Rent &c. Act, 1920,** the leave of the Court must be obtained to levy distress for the rent of any dwelling-house to which the Act applies.

Leases usually contain a condition of **re-entry** empowering the landlord, on default of payment of rent, to re-enter and determine the estate of the tenant. At C. L., before entry could be made or action brought on such a condition, the landlord was required to make a formal demand upon the premises of the exact rent due on the last day on which it could be paid. But by the **C. L. P. A., 1852** (*e*), if half a year's rent be in arrear and no sufficient distress be found (*f*), the landlord may, at the end of the period limited

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(*b*) *Ante*, p. 3. (*c*) *Ante*, p. 47.

(*d*) *I.e.*, by the St. Frauds, as re-enacted by section 54 of the L. P. A., 1925.

(*e*) Section 210.

(*f*) *Thomas* v. *Lulham*, [1895] 2 Q. B. 400; but see *Rickett* v. *Green*, [1910] 1 K. B. 253.

for re-entry, recover the premises by action without formal demand of re-entry. All proceedings must, however, cease if the tenant (including an under-tenant) at any time before trial pays all arrears and costs. By section 42 of the same statute the tenant may apply for relief in equity within six months after execution of the judgment on the ejectment. And by the **C. L. P. A., 1860,** the same relief might be given by Courts of Law. Under section 212 of the C. L. P. A., 1852, relief may be given where the landlord has recovered the premises by entry and not by action (*g*).

A condition of re-entry was formerly inalienable, but by 32 *Hen. VIII. c.* 34, it was provided that it should pass to the assignees, heirs, &c. of the lessor. This statute is repealed, but the **L. P. A., 1925** (*h*), provides that every condition of re-entry and other condition in a lease shall be incident to the reversionary estate in the land and shall be capable of being enforced by the person from time to time entitled, subject to the term, to the income of the land leased.

Rent service being incident to the reversion passes upon the grant thereof. Formerly no grant could be made of a reversion —except by fine—without the consent of the tenant and his **attornment** to the grantee. This was abolished by 4 *& 5 Anne. c.* 3, *s.* 9, re-enacted by the **L. P. A., 1925** (*i*), which provides that where land is subject to a lease the conveyance of the reversion shall be valid without the attornment of the lessee, but this does not (i.) affect the validity of any payment of rent by the lessee to the person making the conveyance, or (ii.) render the lessee liable for any breach of covenant to pay rent on account of failure to pay it to the person entitled under the conveyance before (in either case) notice of the conveyance is given to the lessee by the person entitled thereunder. The Act also provides (*k*) that any attornment made by a lessee, without the consent of his lessor, to a person claiming to be entitled to the lessor's interest in the land shall be void. Accordingly, the conveyance of a rent service is

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(*g*) *Howard* v. *Fanshawe*, [1895] 2 Ch. 581.
(*h*) Section 141, replacing a similar enactment of the C. A., 1881.
(*i*) Section 151.
(*k*) *Ibid.*

now effected by a grant by deed of the reversion. If such a conveyance is made to the tenant himself it is a *release*.

At C. L., rent service might be lost by the destruction of the reversion, *e.g.*, if A. was tenant of lands for a term of years, and B., his under-tenant, for a shorter term, the rent due by B. to A. was an incident of A.'s reversion. If A. obtained the immediate fee simple, his term of years could not co-exist with but *merged* (*l*) into the larger estate, and the term being gone its incidents, including B.'s rent, disappeared. Now, in such a case, by the L. P. A., 1925 (*m*), re-enacting section 9 of the R. P. A., 1845, the incidents of the vanished term would attach to the fee simple, which is deemed to be the reversion expectant on the lease of B.

Remainders.—A remainder could formerly exist as a legal or equitable estate, but now can only be an equitable estate, and there is no exception when it follows a term of years. If A., being owner of land in fee simple, grants the land to B. for life, with remainder to C. in fee simple, A. parts with his whole interest in the land, and the legal estate in fee simple vests in B., who holds on trust for himself for life with remainder on trust for C. in fee simple (*n*); if the grant to B. is for a term of years, C. gets an immediate fee simple subject to the term, and his estate is not a remainder but a legal reversion. These results follow whether the grants were made before or after 1926.

Between the owner of the particular estate and the remainderman no tenure exists, both deriving their estates from the same source, the grant of the owner in fee simple. There being no tenure no rent service is, therefore, incident to a remainder.

A tenant in fee simple having the power to make a lease for years or for life, or a gift in tail or in fee simple, may create all these estates at the same time by limiting them to different grantees successively in any order, provided that the grantee of the fee simple takes last. Thus he may grant to A. for life, and

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(*l*) Whenever a greater estate and a less meet in the same person without any intermediate *vested* estate, the lesser is said to be merged or drowned in the greater.

(*m*) Sections 130, 159.

(*n*) L. P. A., 1925, s. 39, Sched. 1, Part I.; L. P. A. (Amendment) Act, 1924, s. 39, Sched. 1, Part II. (6); S. L. A., 1925, ss. 19, 20.

after his decease to B. for life, and after his decease to C. in fee simple, and before or after or between the grants to A. and B. he may grant estates tail or for years to other persons.

Under the **Settled Land Act, 1925** (*o*), any instrument or number of instruments, whether made before or after the Act, by which land stands limited in trust for any persons by way of succession, is a settlement and must be effected by a vesting deed and a trust instrument (*p*). In the above illustration the *legal* estate in fee simple vests in A., who holds the land in trust for himself for life and for all the parties subsequently interested.

Where numerous estates are granted in this way it is probable that many of the grantees will obtain no benefit, *e.g.*, if A. survive B. the latter can take nothing. Yet B. has an estate for life in remainder immediately vested in him which he can transfer by deed of grant like a reversion. *Whenever any estate is always ready from its commencement to come into possession the moment the prior estates determine it is termed a* **vested remainder.** The gift is immediate, but its enjoyment is postponed to the determination of the prior estates.

It is possible for one person to have more than one estate in the same land at the same time. The limitation of a remainder in fee tail or fee simple to a person who already has an estate of freehold, *e.g.*, for life, has hitherto been governed by the **Rule in Shelley's Case,** which now is abolished as regards instruments coming into operation after 1925 (*q*). This rule is, that *when an ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is "limited either mediately or immediately to his heirs in fee or in tail, the words 'heirs' or 'heirs of the body' are words of limitation and not of purchase";* that is, the heir takes merely by descent and has no separate or independent estate.

This rule was derived as follows (*r*):—The grantee of an hereditary fief was originally considered as entitled for his life only; a tenant in fee simple was a person holding to him and his heirs and could not prevent the estate descending to his heirs (*s*). A gift

(*o*) Section 1. (*p*) *Ante*, p. 27. (*q*) *Post*, p. 88.
(*r*) See *Van Grutten* v. *Foxwell*, [1897] A. C. 658.
(*s*) *Ante*, p. 20.

expressly made to A. for his life, and after his decease to his heirs, was, therefore, considered identical with a gift to A. and his heirs, that is, a gift in fee simple. Similarly a grant to A. for his life, and after his decease to the heirs of his body, gave him an estate tail. Later, a tenant in fee or in tail acquired a right of alienation, but such words retained their effect of creating a fee simple or fee tail, and the words heirs or heirs of the body, which formerly gave an independent estate to the heirs, became merely words of *limitation*, marking out the estate of the grantee.

The same rule applied, even though an estate to some other person was interposed between the gift to A. and that to his heirs, *e.g.*, if lands were limited to A. for his life, and after his decease to B. for his life, and after his decease to the heirs of A. The heir claimed only through his ancestor, who from the mere fact of having an estate which goes to his heirs could defeat their expectation, and, subject to B.'s life interest, could dispose of the whole estate. A., as long as B. lives, had two estates, an estate for life in possession, and an estate in fee simple in remainder, expectant on the decease of B. If B. died in A.'s life, A. became tenant for his own life, with immediate remainder to his own heirs, *i.e.*, he was tenant to himself and his heirs.

The same rule would apply if the remainder were to the heirs of the body of A.; the limitation to the heirs of the body of A. would coalesce with his life estate and give him an estate tail in remainder, expectant on the decease of B., and if B. died in his lifetime A. would become a tenant in tail in possession.

The same rule applied, however many intermediate estates are between that of the ancestor and the heirs, and even though some are estates in tail. Thus, if lands were given to A. for life, and after his decease to B. and the heirs of his body, and in default of such issue to the heirs of A., in such a case A. would have an estate for life in possession with an estate in fee simple in remainder, expectant on the determination of B.'s estate tail. The same principles applied if the first estate is an estate tail.

The rule in *Shelley's Case* required merely that an estate of *freehold* be taken by the ancestor, and not necessarily an estate for the whole of his life. Thus, if lands were given to A., a

widow, during her life, provided she remained unmarried, and after her marriage to B. and his heirs during her life, and after her decease to her heirs, here A. had an estate in fee simple, subject to the remainder to B. for her life should she remarry.

But if the ancestor took no estate of freehold the rule did not apply; if land was granted simply to the heirs of A., A. took no estate by the gift, which was a gift of a future contingent estate to the persons who at A.'s death might be his heirs.

The rule in *Shelley's Case* still applies to all instruments coming into operation before January 1, 1926, but as regards instruments coming into operation on or after that date it is abolished by the **Law of Property Act, 1925** (*t*), which provides that where an interest in property is given to the heir or heirs or issue of any person in words which, under the rule in *Shelley's Case*, would have given to such person an interest in fee simple or an entailed interest, such words shall operate as words of *purchase* and as conferring a distinct estate on the heir or heirs or issue. Thus, if land is granted to A. for life, and after his decease to B. for his life, and after his decease to the heirs of A., the result now is that A. takes an equitable life interest, B. takes an equitable life interest in remainder, and the heirs have a separate and distinct equitable estate in remainder. Moreover, although the heir, as a successor in title, is now abolished (*u*), the interest, in the above illustration, of the heirs is not affected, for they take by express grant, and the L. P. A., 1925 (*x*), provides that where an interest is expressed to be given to an heir or heirs, or any particular heir or class of heirs, the same person or persons shall take as would have taken before the Act.

A reversion or vested remainder in fee simple is alienable by deed of grant or by will, and on intestacy it formerly descended to the heir of the last purchaser just as an estate in fee simple. It was, however, made subject to the L. T. A., 1897, and is now subject to the A. E. A., 1925 (*y*). An entailed interest in remainder cannot, as a rule, be barred without the consent of the protector of the settlement (*z*); nor is it devisable, for the L. P. A., 1925, only permits the disposition by will of property

(*t*) Section 131. (*u*) *Ante*, p. 11. (*x*) Section 131.
(*y*) *Ante*, p. 34. (*z*) *Ante*, p. 28.

of which a testator is tenant in tail in possession (*a*); accordingly on the death of the remainderman it descends in the same way as an entailed interest in possession and is not assets for payment of debts.

CHAPTER XVI.

OF A CONTINGENT REMAINDER.

With certain restrictions, a tenant in fee simple may grant estates to commence in *interest* and not merely in possession at a future time.

Future estates are (i.) **contingent remainders**; (ii.) **executory interests.**

Contingent remainders were long regarded as illegal, but the rule was gradually relaxed, and by the time of Coke the validity of a gift in remainder to become vested on some future contingency was established.

A **contingent remainder,** as distinct from an executory interest, is an estate which waits for the determination of the preceding estate, but as distinct from a vested remainder, it is one which is *not* always ready to come into possession directly the particular estate determines. Immediately it is ready to come into possession it ceases to be contingent. Thus, suppose a gift to A., a bachelor, for life, and on determination of that estate by forfeiture or otherwise in his life to B. and his heirs during the life of A., and after the decease of A. to the eldest son of A. and the heirs of the body of such son. Here B.'s estate, though small, is vested, always ready to come into possession, but the estate tail to the eldest son of A. is contingent, and depends upon A.'s having a son. As soon, however, as a son is born, the remainder is vested.

Of the rules hitherto required for the creation of a contingent remainder, the first was that the seisin must never be without an owner; every contingent remainder of freehold must have a

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(*a*) *Ante*, p. 29.

particular estate of freehold to support it. Freehold could not be conveyed otherwise than by delivery of seisin; if on any feoffment the feudal possession was not parted with, it remained in the grantor. Thus, suppose a feoffment made to A. for his life and after his decease and one day, to B. and his heirs; here, on the death of A. the feudal possession reverted to the grantor, and could not be taken out of him without a fresh conveyance, hence the gift to B. and his heirs was void. Again, if an estate be limited to A., a bachelor, for his life, and after his decease to his eldest son in tail, the son must be ready at once at A.'s death to take (*b*).

The result of the first rule was that *every contingent remainder must become vested during the continuance of the particular estate or on the very instant that it determines, otherwise it will fail.* Thus, suppose land to be given to (*c*) A. for his life, and after his decease to such son of A. as shall attain twenty-four, here if no son of A. attained twenty-four at A.'s death, the gift would fail altogether. However, the Contingent Remainders Act of 1877 saved certain contingent remainders from failure (*d*). The foregoing rule applied only to legal contingent remainders; an *equitable* contingent remainder was never liable to fail through the determination of the preceding interest before it was ready to vest. Now, however, all remainders are equitable and free from the liability to fail, and the Act of 1877 has been repealed as from January 1, 1926 (*e*).

A contingent remainder may be such that the future expectant owner is now living, *e.g.*, conveyance to A. for his life, and if C. be living at A.'s death, then to B. and his heirs. The estate of B. is a future estate *not* always ready to come into possession, for if A. die after C., B. or his heirs can take nothing. B.'s chance is termed a *possibility*, and could not originally be transferred; it might, however, be barred by deed, and might be released by B. to the reversioner. A contingent remainder limited to a living person and his heirs was, and still is, devisable

(*b*) But a child *en ventre sa mère* is considered as actually born for the purpose of taking any benefit to which it would be entitled if born.

(*c*) See *White* v. *Summers*, [1908] 1 Ch. 256.

(*d*) *Post*, p. 101.

(*e*) L. P. (Amendment) A., 1924, s. 10.

and descended on intestacy like a vested remainder, and was similarly subject to the L. T. A., 1897, and is now subject to the A. E. A., 1925 (*f*); and, by the L. P. A., 1925 (*g*), re-enacting the R. P. A., 1845, a contingent interest may be disposed of by deed.

Destruction of Contingent Remainders.—A contingent remainder, as already pointed out, was liable to destruction by the sudden determination of the particular estate on which it depended.

Thus, suppose lands given to A., a bachelor, for his life, and after his decease to his eldest son, C., and the heirs of his body, and, in default of such issue, to B. and his heirs. If A., before the birth of a son, *forfeited* his life estate, the contingent remainder to C. would be destroyed by the letting into possession the estate of B.

So also the possession of the remainder in fee simple would have been accelerated, and the contingent remainder destroyed if A. purchased B.'s remainder, and had it conveyed to him before the birth of a son, as the mere contingent remainder would not have prevented the *merger* (*h*) of the life estate in the remainder in fee.

In the same way the sale (*surrender*) by A. of his life estate to B. would have destroyed the contingent remainder.

The **R. P. A., 1845** (*i*), provided, however, that a contingent remainder should not be liable to destruction through the determination of a prior estate by *forfeiture*, *surrender or merger*, though, subject to the Act of 1877 (*k*) (which also saved the contingent remainders to which it applied from destruction by *disclaimer* of the particular estate), it would still fail if not ready to come into possession when the particular estate would naturally have expired, or did naturally expire.

The destruction of a contingent remainder might be obviated by giving an estate after the determination of A.'s interest in his life to trustees and their heirs, during the life of A., as *trustees to preserve contingent remainders*. This vested estate interposed

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(*f*) *Ante*, p. 52.
(*g*) Section 4.
(*h*) *Ante*, p. 85 n. (*l*).
(*i*) Section 8.
(*k*) *Post*, p. 101.

between the estates of A. and B. prevented their union, and so prevented the remainder in fee simple from coming into possession.

Contingent remainders of **trust estates** were indestructible as the feudal possession remained with the trustees. Thus, if a conveyance was made unto *and to the use of* A. and his heirs in trust for B. for life, and after his decease in trust for his first and other sons successively in tail, here the whole legal estate was vested in A., and nothing done by B. could destroy the contingent remainder. After 1925 all contingent remainders take effect as equitable interests and, accordingly, the Contingent Remainders Act and the foregoing provisions of the R. P. A. 1845, are repealed (*l*).

CHAPTER XVII.

OF AN EXECUTORY INTEREST.

Executory interests are future estates which are indestructible, which do not depend upon but may put an end to prior estates. Before 1926 they might be created under the St. Uses or by will.

Executory interests created under the St. Uses are *springing* or *shifting uses*. Before the statute if a feoffment were made to A. and his heirs to the *use* of B. and his heirs *from to-morrow* the Court of Chancery would, contrary to the rules of law, enforce the use. Here was a springing use, creating a future estate, arising of its own strength and not dependent on a prior estate. The same rule was followed at law after the St. Uses, and the legal seisin of lands might thus be shifted from one person to another without formalities. Thus, in a marriage settlement before 1926, if A. be the settlor, the lands were conveyed by him before the marriage to trustees (B. and C.) and their heirs to the use of A. and his heirs, until the marriage, and thereafter to the uses of the settlement, *e.g.*, to D., the intended husband, for his life, and so on. Here B. and C. took no permanent

(*l*) L. P. (Amendment) A., 1924, s. 10.

estate; A. continued tenant in fee simple until the marriage, on which the seisin at once shifted from him to D. The interest of D., though future and contingent on marriage, was not a remainder, since it was to come after a fee simple, nor does it wait the determination of a prior estate. The use to D. would spring up on the marriage and destroy the fee simple of A.

By means of a use a future estate could be made to spring up at any time. Where, however, a future estate must wait for the determination of a preceding estate it is always a contingent remainder: nothing which can be regarded as a remainder will ever be construed as an executory limitation (*m*).

After 1925 executory interests can exist only as equitable interests (*n*), and they are in practically the same position as before the St. Uses. A settlement is made by two deeds: (i.) A *vesting deed* by which A. (settlor) conveys the fee simple to D. (*intended husband*) who is the *estate owner* and who is expressed to take it upon the trusts declared by a second deed, known as the *trust instrument* (*o*). By these trusts D. holds the land on trust for A. until the marriage, and thereafter on trust for himself for life, and so on. Thus, until the marriage the life interest of D. is still an executory interest, but is equitable and not legal.

A tenant in fee, with an executory limitation over, may, unless expressly prohibited, commit legal but not equitable waste.

Powers are methods of causing a use with its accompanying estate to spring up at the will of any person. Thus land might be conveyed to A. and his heirs to such uses as B. should appoint, and in default of and until such appointment to the use of C. and his heirs. These uses conferred on C. a vested legal estate subject to be divested on B. exercising his power of appointment. After 1925, subject to certain exceptions, every power of appointment, whether created before or after 1926, can operate in equity only (*p*). Thus C. and any person in whose favour B. exercises his power will have only equitable interests. But, even so, B.,

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(*m*) *Re Wrightson*, [1904] 2 Ch. 95; *White* v. *Summers*, [1908] 2 Ch. 256.

(*n*) L. P. A., 1925, s. 1.

(*o*) *Ante*, p. 27.

(*p*) S. L. A., 1925, s. 1. The exceptions are (1) a power vested in a legal mortgagee (*id.*, ss. 8, 104). (2) A power vested in an estate owner in right of his estate, *e.g.*, the statutory powers of a life tenant (*id.*, ss. 7, 8).

though not owner of the property, has the power to dispose of it in equity and may appoint to himself or dispose of it by will.

Such a general power of appointment is so nearly equal to ownership that, unless it is exercisable by will only, the land subject thereto can be seized by B.'s creditors in his life under the J. A. 1838, and a judgment can operate as an equitable charge thereon (*q*). Moreover, the power may be exercised for their benefit by B.'s trustee in bankruptcy (*r*).

If the power is exercised in favour of a person not claiming for valuable consideration, the lands will also be liable for B.'s debts after his death.

But, apart from the above, if B. dies without making any appointment C. becomes indefeasibly entitled to the lands. Where a general power of appointment over realty is exercised by will the lands now vest in the P. R. under the **A. E. A., 1925,** subject to the right of the appointee to require a conveyance if the lands are not wanted to satisfy the testator's debts, &c. (*s*).

If before 1926 B. exercised his power and appointed the lands to the use of D. and his heirs, D., by virtue of the *use* appointed in his favour, had at once an estate in fee simple in possession, and the estate of C. was at an end. The only power of B. was over the *use*; if, therefore, B. made an appointment to D. and his heirs *to the use of* E. and his heirs, D. would still have the use and the legal estate, though he would be a trustee thereof for E. Now, however, the St. Uses is repealed and the power of appointment can operate only in equity.

In exercising a power, the terms thereof and all the formalities required by it must be observed; if the power requires a will, it cannot be exercised by deed nor *vice versâ*. But by the **L. P. A., 1925** (*t*), re-enacting Ld. St. Leonard's Act, 1859, a deed executed before and attested by two or more witnesses in the ordinary manner is a valid execution of any power of appointment by deed, although other formalities may have been directed by the instrument creating the power. This Act, however, only

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(*q*) *Ante*, Chap. XII.
(*r*) Bankruptcy Act, 1914, ss. 38, 55; and see *Re Guedalla*, [1905] 2 Ch. 331.
(*s*) A. E. A., 1925, s. 3; replacing the L. T. A., 1897, see *ante*, p. 54.
(*t*) Section 159.

refers to the *mode* of execution and attestation; any other directions, *e.g.*, as to obtaining the consent of any person, must be observed.

Where, however, the intended appointee is a purchaser from the person intending to exercise the power, or is his creditor, wife, or child, or is a charity, Equity will relieve against the defective execution of a power.

Powers of appointment by **will** must be made in accordance with the W. A., 1837 (*u*), and if so made are valid, though some other formality or different form of execution was required. Under the Wills (Sailors and Soldiers) Act, 1918 (*x*), a power to appoint real estate by will may be exercised by an informal will.

A man might always exercise a power of appointment in favour of himself or his wife, though he could not directly convey to himself or, before 1882, to his wife. A married woman might exercise a power of appointment without the consent of her husband. And—unless expressly forbidden—an infant may, under the I. S. A., 1855 (*y*), make a valid appointment.

By the W. A., 1837 (*z*), a general devise of the real estate *or* personal estate of a testator includes realty or personalty over which he has a general power of appointment, unless a contrary intention appears in the will.

A power of appointment may exist with ownership, *e.g.*, where land is limited (before 1926) to such uses or (after 1925) upon such trusts as A. shall appoint, and in default of such appointment to A. in fee simple. Here A. may dispose of the land either by exercising the power or by conveying his estate.

Special Powers.—The estate to arise on the exercise of a power may be limited. Thus, where the estate of a life tenant was limited to him by way of *use*, a power might be conferred on him of leasing the land for any number of years. On the exercise of such a power, a use with its accompanying estate

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(*u*) Section 10.

(*x*) *Ante*, p. 59.

(*y*) *Ante*, p. 71. But an appointment executed by an *infant tenant in tail* who dies under age becomes void. The provisions of this Act remain in force provided that a legal estate is not vested in an infant.

(*z*) Section 27.

would arise to the tenant quite independently of the continuance of the life of the tenant for life. If the life tenant did not conform with the terms of the power, the lease was void, but the Leases Act of 1849 provided that, if made *bonâ fide*, and if the lessee had entered, it should be good in equity as a contract for a grant of a valid lease under the power; it was also provided that, where a power to grant leases in possession was attempted to be exercised by a lease to commence a few days after a date, the lease should be valid if the lessor's estate continued until the day appointed for the commencement of the lease; these provisions were re-enacted by the L. P. A., 1925 (*a*). Express powers of leasing might also be validly created but were superseded by the powers given by the Settled Land Acts and cannot now take effect under the St. Uses. Before 1883 powers of *sale and exchange* were also commonly inserted in settlements, the trustees having power for that purpose to *revoke* the uses of the settlement as to the lands so sold, &c., and to appoint to such uses as might be necessary. But it was provided that any money arising on sale or exchange should be laid out in other lands to be settled to the uses of the land, and this direction made the money real estate in equity, and the parties entitled under the settlement took the same estates therein as if actually so laid out. Such express powers became unnecessary after the S. L. A., 1882, which is now re-enacted and extended by the S. L. A., 1925. But, after 1925, if the settlement creates any express powers (not being merely a power of revocation of appointment), such powers are exercisable by the tenant for life or statutory owner as if they were additional powers given by the settlement (*b*).

Under the S. L. A., 1925, extending a similar provision of the S. L. A., 1882, a sale or other authorised disposition may be made of land without minerals or of minerals without land (*c*).

Extinguishment of Powers.—Powers may be extinguished by deed of release made by the donee of the power to any person having any estate of freehold in the land. By the C. A., 1881, a person to whom any power is given may by deed release it or

(*a*) Section 152. (*b*) S. L. A., 1925, s. 108.
(*c*) *Id.*, ss. 50, 108, Sched. 4, para. 4.

contract not to exercise it. But the Statute does not apply where the *duty* of the donee may require him to exercise it at some future time, *i.e.*, where it is coupled with a trust.

By the Fines and Recoveries Act, 1833, it was provided that a married woman might, with the concurrence of her husband by deed acknowledged, release any power as if she were a *feme sole*; after 1925, however, acknowledgment is not necessary (*d*).

A power may, under the L. P. A., 1925 (*e*), be disclaimed by deed.

The above rules do not, however, apply to *statutory* powers.

Executory Interests may be also created by Will.—The earliest instances probably occurred in directions that executors should sell lands devisable by custom. The sale operated as the execution of a power by the testators to dispose of the freeholds in which they had no ownership, and shifted the fee simple from the heir to the purchaser.

The Court of Chancery, also, in permitting the devise of the *use* of lands, allowed the creation of executory interests by will. By the St. Uses, wills of uses were abolished until restored by the St. Wills. The uses had then become legal estates, but, following the old rule, future estates at law were allowed to be created by will, and were given the attribute of indestructibility. These future estates were called **executory devises.** Thus, A. devises land to his son A., an infant, in fee simple, but if A. dies under twenty-one, to B. in fee simple. A. before 1926 has a fee simple in possession subject to an executory interest in favour of B.; if A. dies before twenty-one, nothing can prevent the estate of B. from coming into possession. The same effect might be obtained by a conveyance to uses, but *not* by a direct conveyance vesting in A. an estate in fee simple, because no limitation could follow such an estate. After 1925 executory devises can only take effect as equitable interests (*f*) and in the foregoing illustration the legal estate vests in the executors who hold it on trust for A., but if he dies before attaining twenty-one, on trust for B. Meanwhile, the trustees have all the powers of

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(*d*) L. P. A., 1925, s. 167.
(*e*) Section 156 re-enacting section 6 of the C. A., 1882.
(*f*) L. P. A., 1925, s. 1.

trustees for sale, including the powers of a tenant for life under the S. L. A., 1925 (*g*).

Difference between Contingent Remainder and Executory Devise.—Devise to A. for life, with remainder to the first son of B. who attains twenty-one. If A. survives the testator this is a contingent remainder, the limitation to the son of B. depending on the determination of the prior estate of A. If A. dies before the testator the will commences with the limitation to the son of B. which arises as soon as a son of B. attains twenty-one, and does not await the determination of any prior estate; it is therefore an executory devise. Before 1926, if the testator died before a son of B. attained twenty-one, the legal estate passed to his heir-at-law; now, however, it vests in the executors who hold it with all powers of trustees for sale on trust for the persons entitled under the new rules of intestacy (*h*). Before 1877, if A. survived the testator, but died before any son of B. attained twenty-one, the limitation failed for want of an estate of freehold to support it; now it does not (*i*).

By the R. P. A., 1845, all executory interests may be disposed of by deed. An executory interest given to an ascertained person and his heirs will devolve on his death like a contingent remainder limited in fee to an ascertained person.

Estates may also arise under **statutory powers,** *e.g.*, the powers given to a life tenant under the S. L. A., 1882, who may convey the whole legal fee simple in the settled land if comprised in the settlement, though he himself has merely an equitable estate for life. And now, under the **S. L. A., 1925** (*k*), a tenant for life may convey the settled land by deed for the estate or interest vested in him, or any less estate or interest (*l*), in the manner requisite for giving effect to the powers given by the

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(*g*) A. E. A., 1925, s. 39; L. P. A., 1925, s. 28.

(*h*) See previous note and A. E. A., 1925, s. 33.

(*i*) See *ante*, p. 90.

(*k*) Section 72.

(*l*) But subject to (i) all legal estates and charges by way of legal mortgage having priority to the settlement; (ii) all legal estates and similar charges conveyed or created for securing money raised at the date of the deed; (iii) certain leases and grants made or agreed to be made for value before the date of the deed, and at the date of the deed protected by registration under the L. C. A., 1925, if capable of registration thereunder.

Act. But there is this difference between the two Acts. Under the S. L. A., 1882, the legal estate in the settled land vested in the transferee solely by virtue of the Act which empowered the tenant for life. But under the S. L. A., 1925, the tenant for life conveys only the estate or interest vested in him by the last or only vesting deed and he conveys it, not because by force of the Act his conveyance takes the legal estate out of other persons in whom it is vested, but because, being the *estate owner*, he is the person in whom it is vested.

But, under the L. P. A., 1925, a *statutory* power of sale, in the strict sense, is conferred on a legal mortgagee and on a chargee by way of legal mortgage (*m*).

CHAPTER XVIII.

OF REMOTENESS OF LIMITATION.

The rule against perpetuities requires every future estate limited to arise by way of executory interest to be such as *must necessarily arise within the compass of existing lives and twenty-one years after*, allowing for gestation where some person entitled is a posthumous child. If no lives are fixed, then twenty-one years only is allowed.

Every executory interest which *might* in any event transgress these limits is void from its commencement, excepting only executory limitations in defeasance of or immediately preceded by an estate tail. Thus, a gift by way of executory interest to the first son of A., a bachelor, who shall attain twenty-four, is void for remoteness, for if A. died leaving a son a few months old, the estate of the son could not arise within twenty-one years after A.'s death (*n*).

The same rule applies to equitable contingent remainders (*o*) and hence, after 1925, to all contingent remainders.

(*m*) *Ante*, p. 93; *post*, p. 135.

(*n*) In the case of an executory gift by *will*, the time is computed from the death of the testator. If, therefore, the gift were made by will and A. were to die before the testator, leaving a son, it would be valid.

(*o*) *Abbiss* v. *Burney*, 17 Ch. D. 211.

But where an instrument is executed after 1925, or, in case of a will, the testator dies after 1925, the **L. P. A., 1925** (*p*), provides that, if the vesting of property or the ascertainment of the person or class to take depends on the attainment by that person or members of that class of an age exceeding twenty-one years and the gift would, but for the Act, be void for remoteness, it shall take effect as if the age specified had been twenty-one years.

Executory limitations contained in instruments coming into operation after 1882 are governed also by the **L. P. A., 1925** (*q*), enacting that where a person is entitled to land for an estate in fee, or for a term of years absolute, or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on default or failure of issue, the limitation shall become void as soon as any issue of the class on default or failure of which the limitation was to take effect has attained the age of twenty-one; and as regards instruments coming into operation this restriction applies to executory limitations of personalty.

Restriction on Accumulation.—By the **L. P. A. 1925** (*r*), re-enacting similar provisions of the *Thellusson Act*, 1800, the accumulation of income is forbidden for any longer term than (i.) the life of the grantor or settlor, or (ii.) twenty-one years after his death, or (iii.) the minority of any person living or *en ventre sa mère* at the death of the grantor, &c., or (iv.) the minority of any person who under the settlement would, if of full age, be entitled to the income directed to be accumulated. But the Act does not extend to provisions for payment of debts or raising portions for children or remoter issue of the grantor, &c., or of a person taking an interest under the settlement, nor to any directions touching produce of timber or wood, nor to trusts for expending income on repairs. Any direction to accumulate, which exceeds the period allowed, is valid up to the time allowed, but void for the excess. But if the direction exceeds the perpetuity rule it is void altogether. By the L. P. A., 1925 (*s*), re-enacting the Accumulations Act of

(*p*) Section 163.
(*q*) Section 134, re-enacting similar provisions of the C. A., 1881, s. 10.
(*r*) Section 164.
(*s*) Sections 166, 207

1892, the accumulation of income for the purchase of land is allowed only for the fourth of the above periods; but this provision does not apply to accumulations to be held as capital money for the purposes of the S. L. A., 1925, or any enactments which it replaces.

Rules governing Contingent Remainders.—The C. L. rule was that every legal contingent remainder must be supported by a particular estate of freehold, and must therefore vest during or immediately on the termination of the particular estate (*t*). From the consequences of this rule the **Contingent Remainders Act, 1877,** saved every contingent remainder created after that Act which would have been valid if originally created as an executory interest.

But for a limitation to be good as such, it must conform to the perpetuity rule. Thus, if land were granted after 1877 to A., a bachelor, for life, and on his death to his first son who shall attain twenty-four, but A. died before any son of his attained twenty-four, the contingent remainder to A.'s son would fail by the common law rule. And it would not be saved by the Act of 1877, being outside the perpetuity rule.

These considerations do not, however, now apply to contingent remainders since they are all equitable and not liable to be defeated by the determination of the prior particular estate.

Perpetuity in the Case of Contingent Remainders.—In this case the rule adopted was that an estate given to an unborn child for life could not be followed by any estate to any child of such unborn person, and that such a remainder would be void although expressly confined to such child of the unborn parent as should be born within the compass of lives existing at the time of the gift (*u*). This rule was held to apply also to equitable contingent remainders. Now, however, the **L. P. A., 1925** (*x*), provides that in instruments coming into operation after 1925 an equitable interest in land may be given to an unborn person for life with remainder to any child or other issue of that person, provided that the gift does not infringe the rule against perpetuities.

(*t*) *Ante*, pp. 89, 90.
(*u*) *Whitby* v. *Mitchell*, 42 Ch. D. 494; 44 Ch. D. 85.
(*x*) Section 161.

Cy-près Doctrine.—In case, however, of a gift *by will* to the unborn son of some living person for his life, and after the decease of such unborn person to *his* sons *in tail*, the Courts endeavoured to carry out the intention of the testator by giving such son an estate in tail. This doctrine can no longer be applied, for the **L. P. A., 1925** (*y*), provides that an entailed interest can only be created by the like expressions as those by which, before 1926, an estate tail could have been created by deed (not being an executory instrument) in freehold land.

In 1889, however, it was further established that a contingent remainder limited to take effect after a contingent remainder (*z*) is void unless it must vest within the time allowed by the perpetuity rule (*a*). This, however, does not apply to a contingent remainder limited to take effect on the termination of an estate tail or an entailed interest originally limited as a contingent remainder.

Powers.—Where powers of appointment are given in favour of particular objects, as the appointor's children, the estates which arise from the exercise of the power take effect as if they had been inserted in the settlement by which the power was given, and any estate which would have been void for remoteness in the original settlement will be invalid as the offspring of the power.

Creditor's Rights.—By the L. P. A., 1925, re-enacting the J. A., 1838, and the L. C. A., 1900, a judgment, provided that a writ or order for enforcing it is duly registered, is an equitable charge on all future interests in land, whether legal or equitable; estates in reversion or remainder expectant on a freehold estate cannot be taken in execution under a writ of elegit, but if the judgment creditor registers a writ of elegit he will get the statutory charge, although they cannot actually be delivered in execution (*aa*). Future estates and interests vest in a trustee in bankruptcy and are assets for the payment of the owner's debts after his death.

(*y*) Section 130.

(*z*) *E.g.*, a limitation of land in trust for A., a bachelor, for life and after his death in trust for his first son for life, and after the son's death in trust for A.'s eldest daughter, who shall *then* be living.

(*a*) *Re Frost*, 43 Ch. D. 246.

(*aa*) *Ante*, pp. 64, 65.

CHAPTER XIX.

OF HEREDITAMENTS PURELY INCORPOREAL.

PURELY incorporeal interests are (1) **appendant** and (2) **appurtenant** to corporeal property—both of which pass by the conveyance of the corporeal property; (3) in **gross** which require a deed for their transfer.

Class 1 includes—

(i.) A **seignory,** *i.e.*, the lordship (without any *reversion*), which remained in the lord of a manor, who granted part of the lands in fee simple. To this seignory the rent and fealty due from the tenant were incident, the land being holden of the manor. The Statute of Quia Emptores left untouched any existing tenancies in fee simple (*b*), and where lands are so held the seignory is an appendage to the manor and passes under a conveyance of it. Now, however, a seignory is merely a nominal right, for escheat is abolished and all manorial incidents will be extinguished by the end of 1935 (*c*).

(ii.) **Rights of common,** as common of *turbary*, common of *piscary*, and common of *pasture*, *e.g.*, the right of free tenants of a manor to pasture their cattle on the waste lands, or to take turf, &c., therefrom.

(iii.) **Advowsons appendant to a manor** (*d*).

Strips of waste at the side of a road, and the soil of the highway to the middle of the road, presumptively belong to the owner of the adjacent land on either side, and pass therewith (*e*). The same applies to the soil of a river, except a tidal river, in which the soil to high-water mark belongs to the Crown (*f*). The Crown is also presumptively entitled to the soil of the seashore to high-water mark (*g*).

(*b*) *Ante*, p. 6.
(*c*) *Ante*, p. 12.
(*d*) *Post*, p. 108.
(*e*) *Belmore* v. *Kent County Council*, [1901] 1 Ch. 873; *Offin* v. *Rochford Rural Council*, [1906] 1 Ch. 342.
(*f*) *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C. 192.
(*g*) See *Brinckman* v. *Matley*, [1904] 2 Ch. 313.

Class 2 includes incorporeal interests not naturally appendant to corporeal interests, but annexed to them by express grant or prescription, *e.g.*, rights of way. Where so annexed they pass at C. L. by conveyance of the corporeal hereditaments. If not strictly appurtenant to the lands, though enjoyed therewith, they did not so pass without express mention; but now, by the **L. P. A., 1925** (*h*), a conveyance of land includes all commons, ways, easements and rights, reputed to appertain to the land or enjoyed therewith, unless a contrary intention is expressed in the conveyance.

Class 3 includes—

(i.) A **seignory in gross,** one severed from the demesne lands of the manor to which it was formerly appurtenant.

(ii.) A **rent seck,** a rent for which no distress could be made. This might arise where a landlord granted away his rent service independently of the seignory or reversion to which it was incident, or where a *rent-charge* was made without a clause of distress. But by 4 *Geo. II. c.* 28, *s.* 5, a remedy by distress was given for rent seck. Apart from distress, however, a grantee who had received any part of the rent had a real action against the tenant, and when such real actions were abolished he was allowed to sue the tenant personally.

(iii.) A **rent-charge**.—This arises on a grant by A. to B. of an annual sum of money payable out of lands in which A. has any estate, with power to distrain. A rent-charge cannot continue longer than the estate of the grantor, but if he be seised in fee simple it may be of any estate, *e.g.*, for a term of years or in fee simple. It can be created or transferred only by deed or will. Annuities or rent-charges for a life or lives or for any estate determinable on a life or lives granted otherwise than by marriage settlement or will required registration under the J. A., 1855, in order to affect any lands as against a purchaser or mortgagee without notice thereof. By the **L. P. A., 1925** (*i*), a rent-charge may also be granted out of another rent-charge.

Now, however, such annuities or rent-charges are equitable interests only, and a purchaser of a legal estate in the lands

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(*h*) Section 62, re-enacting section 6 of the C. A., 1881.
(*i*) Section 122.

affected will take free from them unless he has notice, and even where he has notice they may be overreached (*k*). Accordingly, by the **L. C. A., 1925** (*l*), they are not now to be entered on the register of annuities; but an annuity which, before 1926, was capable of being registered is void as against a creditor or purchaser of any interest in the land charged unless registered in the register of annuities or the register of land charges. The **L. C. A., 1925** (*m*), moreover, establishes five classes of *land charges* which should be registered in the Register of Land Charges, and rent-charges may be land charges within three of those classes and may in some cases be void as against a purchaser for value of the land charged unless registered in the registry of land charges before completion of the purchase (*n*).

Registration is *not* required to perfect the title of a grantee of a rent-charge in fee simple or in tail or of a rent-charge for a term of years not being a land charge within the L. C. A., 1925.

Before 1926 rent-charges in settlements were usually created under sections 4 and 5 of the St. Uses, which applied to *uses* of rent-charges the same rule as to uses of estates. If, therefore, land was conveyed to A. and his heirs to the use that B. and his heirs might receive a rent-charge in trust for C. and his heirs, the Statute vested the legal estate in B.; but he was merely a trustee for C., who had the equitable estate in fee simple in the rent-charge. Now, however, a rent-charge may be created or reserved without the intervention of a use.

In granting a rent-charge it was formerly necessary to give the grantee an express power of distress or the rent was merely a *rent seck*. It was also usual to give the grantee a power to enter on non-payment of rent, and to receive the rents and profits until all arrears and expenses were paid.

Now by the **L. P. A., 1925** (*o*), replacing section 44 of the C. A., 1881, and section 6 of the C. A., 1911, any person entitled to a rent-charge or annual sum—not being rent incident to a reversion—charged upon land or the income thereof by any instrument coming into operation after 1881 has—unless a contrary intention is expressed in the instrument—a power (1) of

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(*k*) L. P. A., 1925, s. 2, *ante*, p. 13 (*l*) Section 4.
(*m*) Section 10. (*n*) *Id.*, ss. 13, 14. (*o*) Section 121.

distress if the rent or any part is unpaid for twenty-one days; (2) if unpaid for forty days to enter and take the income until arrears are paid; and (3) whether possession be taken or not to demise all or part of the land to a trustee for a term of years on trust to raise all arrears and expenses; but after 1925 this power does not authorise the creation of a *legal* term unless the annual sum is a rent-charge held for a legal estate. Where the rent is created under a *power*, the above powers are exercisable whether the instrument conferring the power came into operation before or after December 31, 1881, unless such instrument otherwise directs. Where a rent-charge or other annual sum is charged on a rent-charge, the person entitled has, in substitution for the foregoing powers, a power, if the annual sum or any part thereof is unpaid for twenty-one days, to appoint a receiver thereof as if he were a mortgagee thereof.

All the above powers are without prejudice to any estate interest or charge having priority over the annual sum. The rule against perpetuities does not apply to these statutory powers nor to similar powers conferred by any instrument.

By the Improvement of Land Act, 1899, rent-charges created under the Improvement of Land Act, 1864, or any special Improvement Act, are recoverable only by the above methods. Incorporeal interests in land are the subjects of the same estates as corporeal property and may be held for a life estate or a *pur autre vie* estate or for an estate in fee simple, though after 1925 the former can only be equitable interests. By the C. A., 1911, s. 6, these powers are made exercisable where the annual sum is created under a *power* contained in an instrument coming into operation before or after the commencement of the Act of 1881, unless such instrument otherwise directs. The same Act declares that the *perpetuity rule* does not apply to any powers or remedies created by the C. A., 1881, or by any instrument for recovering or compelling the payment of any annual sum within section 44.

By the Improvement of Land Act, 1899, rent-charges created under the Improvement of Land Act, 1864, or any special Improvement Act, are recoverable only by the above methods, and not by personal action.

Estates *pur autre vie* in rent-charges and other incorporeal hereditaments were subject to the W. A., 1837, and the L. T. A., 1897, and are now subject to the A. E. A., 1925 (*p*).

An estate in *fee simple* in lands is often disposed of for building purposes in consideration of a *rent-charge in fee simple* by way of ground rent. Before 1926 this was effected by a conveyance to the purchaser and his heirs to the *use* that the vendor and his heirs might receive a certain rent-charge, and subject thereto to the use of the purchaser, his heirs and assigns for ever. The purchaser thus acquired an estate in fee simple, subject to a perpetual rent-charge. Now, however, since the St. Uses is repealed it is sufficient for the vendor to grant the land to the purchaser in fee simple, reserving a perpetual rent-charge (*q*).

Such rent-charges are usually further secured by a covenant for payment by the purchaser, which is, however, a *personal* covenant only enforceable against the purchaser or his representatives, and not against his assigns. But the rent-charge may be recovered by action against the actual tenant for the time being, whether the purchaser, his heir or his assign.

A rent-charge was formerly indivisible, and a release of part of the land from the charge was a release of the whole. But by the **L. P. A., 1925** (*r*), re-enacting the Law of Property Amendment Act, 1859, a release is limited to the part actually released. The Minister of Agriculture and Fisheries has power to apportion rents of every kind on the application of any person interested in the land or rent.

By the Bankruptcy Act, 1914, a trustee in bankruptcy may *disclaim* any property of the bankrupt which consists of land burdened with onerous covenants, and the Court may make an order vesting such property in any person entitled thereto.

Incorporeal hereditaments are in general subject to the same rules as corporeal and are alienable and devolve in the same way. In one respect they differ. Land is the subject of tenure, and rent service is an incident of the estate to which it belongs. But the receipt of a rent-charge is incident to nothing; it cannot be

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(*p*) *Ante*, pp. 52, 53.
(*q*) L. P. A., 1925, s. 65.
(*r*) Section 70.

subject to any tenure, nor originally could there be any escheat on the death of the owner. By the Intestates' Estates Act, 1884, the law of escheat was made applicable to legal and equitable estates in incorporeal hereditaments, just as to legal estates in corporeal hereditaments; but escheat is now abolished as regards persons dying after 1925 (*s*).

(iv.) A **Right of Common in Gross.**—This is a right of common possessed by a person as an independent subject of property, and not as appendant or appurtenant to any lands of his own.

(v.) An **Advowson in Gross.**—An advowson is a perpetual right of presentation to an ecclesiastical benefice. The owner thereof is the patron of the benefice, and exercises his right by a *presentation* to the bishop of some qualified nominee whom the bishop is bound to *institute* to the benefice and cause to be *inducted* into it.

When the advowson belongs to the bishop it is *collative*. In some cases of advowsons *donative* the patron's deed of donation was sufficient, but by the Benefices Act, 1898, all such advowsons were made presentative.

Advowsons are (a) of **rectories,** which were originally appendant to some manor and part of the manorial property of the lord who endowed the church. Advowsons in gross arose chiefly on the severance of advowsons appendant from the manors to which they belonged. Any advowson may now be severed from the manor, and then becomes an independent incorporeal hereditament. While appendant it passes by a conveyance of the manor; if severed it requires a deed of grant. (b) Of **vicarages.** Advowsons were often granted to spiritual corporations, who became patrons thereof, but left the duties to be performed by a priest as their *vicar*. Hence arose vicarages, the advowsons of which at first belonged to the owners of the rectories as appendant thereto, but have in many cases become advowsons in gross.

The sale of an advowson does not include the right to the *next presentation* unless made when the church is *full*. The sale of a present right to present would be **simony.** But formerly, before a vacancy actually occurred, the next presentation might be sold, and when so sold was personal property. By the

(*s*) *Ante*, p. 12.

Benefices Act, 1898 (Amendment) Measure, 1923, a clergyman cannot present himself or be presented to any benefice the right of patronage to which has, since July 14, 1924, become vested by transfer or otherwise in himself or his wife or in some other person on behalf of himself or his wife. The advowson itself devolves like a fee simple estate. Now by the **Benefices Act, 1898,** any sale or grant of the next presentation, or anything less than the whole advowson, is void, though in a family settlement a life interest may be reserved to the settlor. This Act also places restrictions on the sale by public auction of any right of patronage.

(vi.) **Tithes** were the exclusive property of the Church until the dissolution of monasteries by Henry VIII., when grants of their property, with tithes, were made to laymen. And as the grants were made to the grantees and their heirs, or heirs of their bodies, tithes became hereditaments in which estates might be held, and by 32 Hen. VIII. it was directed that they should be transferred by the same assurances as corporeal hereditaments. So, also, they descend in the same way, but are not affected by any custom; nor is there any merger if tithes and lands are owned by the same person, nor will they pass on a conveyance of the land unless expressly mentioned.

Under the Commutation of Tithes Acts, a rent-charge has been substituted for tithes in kind, and provision is made for the merger of tithes or the rent-charge in the land.

By the Tithes Act, 1891, tithe rent-charge is recoverable only by an order of the County Court of the district where the lands are situate, enforceable by distress and entry if the lands are occupied by the owner, otherwise by the appointment of a receiver. Only two years' arrears can be recovered, and no one is personally liable for the payment thereof. Tithe rent-charges devolve like other realty.

CHAPTER XX.

OF COPYHOLDS.

SECT. I.—*Of the Origin of Copyholds.*

ALL copyhold is now enfranchised, but the former law will for some time remain of importance.

Copyholds were lands holden by *copy* of Court roll, *i.e.*, the roll in which a record was kept of all the proceedings in the Court of the manor to which the lands belong. Copyhold tenure grew out of villenage (*t*). At the Conquest the *villanus* was personally free, but later the condition of the peasantry became depressed; and by the 13th century a clear distinction had arisen between socage, which had become freehold, and the tenure of the ordinary *villanus*, whose services were held to be servile.

As a result, the *villanus* became personally unfree; a free man might, however, hold land by villein *tenure*, and hence the word *villanus* was used to denote either a tenant in villenage, whether bond or free, or one who was in personal condition a bondman; later still it was confined to the latter meaning.

In the 13th century villenage was (1) *pure*, where the services were uncertain and unlimited; (2) privileged, where, though still servile, they were fixed by agreement. Tenant in villenage held in the name and at the will of his lord who was seised of land held of him in villenage; if ejected by his lord, he had in (1) no legal rights against him, in (2) his agreement gave him a right to sue his lord personally.

Villein *socage* was the tenure of lands of manors in the ancient demesne of the Crown by fixed and servile services. Such tenants were personally free, and could not be ejected while they performed their services, but their possession was not protected in the King's Court nor could they alienate their holdings.

Growth of Copyhold.—The will of the lord was largely controlled by custom, and the maintenance of customary rights

(*t*) *Ante*, p. 2.

was preserved in the manorial Court, of which all the villagers, bond and free, were judges, and in which the possession of a *villanus* was protected against everyone but his lord. As customs developed into rights, and personal bondage died out—owing largely to the commutation of labour services for money rents—villenage developed into copyhold. *Sub* Edw. IV. Littleton describes the tenant by copy of Court roll as holding lands in fee simple, fee tail, or for life, at the will of the lord, according to the custom of the manor, in virtue of an immemorial custom within the manor. By this time the Court held for customary tenants was distinct from the Court Baron, the lord only or his steward being judge of the Customary Court. Gradually the interests of copyholders developed into customary *estates*, secured by rights which could be enforced in the King's Courts instead of by custom. Under Hen. VI. it was said that a tenant by copy of Court roll should have a remedy in Chancery against his lord who dispossessed him; and under Edw. IV. his rights against his lord were, to some extent, recognised at law, but they were not finally secured until Elizabeth, when it was decided that a copyholder might recover possession from his lord as well as from a stranger in an action of ejectment which he could bring at Common Law.

Sect. II.—*Of Estates in Copyhold.*

An estate in copyholds was not a freehold, but, in construction of law, merely an estate at the will of the lord of the manor. The seisin and feudal possession remained in the lord who had the legal estate controlled only by the custom of the manor. The lord also had the right to all mines and minerals, and timber, though, subject to any special custom of the manor, he could not come upon the lands to open mines or cut timber without leave of the copyholder. Again, if a copyholder, without his lord's consent, granted a lease of his lands beyond a year, it would be a cause of forfeiture unless permitted by special custom. So also a copyholder might not commit *waste*, either voluntary or permissive; he had merely a customary right to occupation, and if he exceeded this right it was a cause of forfeiture.

The same incidents belonged in general to **customary freeholds,** a tenure by copy of Court roll but not held at the will of the lord (*u*).

While the copyholder with regard to the lord was strictly a tenant at will, he stood, when admitted, with respect to other copyholders in a similar position to a freeholder who has the seisin. The legal estate was in him, and he might hold customary estates analogous to those in freeholds, *e.g.*, in fee simple, in tail, or for life.

On every change of tenancy by death or alienation, and occasionally on change of the lord, a *fine* was payable to the lord. Such fines were in modern times restricted to two years' improved value of the land, deducting quit rents. Free power of alienation appertained to an estate in fee simple in copyholds.

Estates Tail in Copyholds.—The *St. De Donis* (*x*) did not apply to copyholds. Where an estate was given to a copyholder and the heirs of his body, then (i.) if there was in the manor no custom to entail, the donee took an estate analogous to the fee simple conditional at C. L., (ii.) if there was a custom to entail, the estate was originally inalienable, but later might be barred according to the custom of the manor by a customary *recovery*, or by forfeiture and regrant, or by surrender.

Under the Fines and Recoveries Act, 1833, a customary estate in fee tail might be barred by conveyance by surrender. Where the estate tail was in remainder, the consent of the *protector* might be given either by deed or by his concurrence in the surrender.

Estates pur autre vie in Copyholds, in case of the death of the grantee during the life of the *c. q. v.*, formerly passed to the lord during the residue of the life of the *c. q. v.*, and no one could hold them as *general occupant*; they were, however, governed by the W. A., 1837 (*y*).

Legal estates in copyhold or customary freehold were not, either in respect of liability for the debts, &c., of a deceased

(*u*) There was, however, another species of customary freeholds in which the freehold was not in the lord, the tenants having the rights of other freeholders, subject only to a customary mode of alienation.

(*x*) *Ante*, p. 25.

(*y*) *Ante*, p. 38.

tenant or in respect of their devolution, affected by the L. T. A., 1897. Subject to any special custom, they devolved according to the Inheritance Act, 1833; the heir was not, however, tenant as against the lord until he had been admitted.

Fealty and suit of Court were due from a copyholder, and the lands would escheat to the lord on failure of heirs. When a copyholder in fee alienated the land in tail or for life, the alienee did not hold of him as in the case of freehold but of the lord.

Heriots.—Before the Conquest it was the custom for the freeholder to furnish his tenant in villenage with oxen, a cow, sheep, and implements of husbandry. These reverted to the freeholder on the tenant's death, and were usually transferred to the new tenant. In time it became customary that the tenant's heir should succeed him, and that the landlord should take into his own hands, not the whole stock, but only the best beast or other chattel, called a heriot, after the analogy of the heriot proper, which was a tribute of war-horses, weapons and armour due to the King on the death of an eorl or thegn. The right of the lord, however, came to be limited to such a chattel as the custom of the manor permitted him to take, and in some cases merely to a money payment.

Husband and Wife.—A husband possessed the same rights over his wife's copyholds as her freeholds. But by the M. W. P. A., 1870, rents and profits of copyhold or customary freehold descending on a woman married after the Act as heiress of an intestate were made her separate property. And after the M. W. P. A., 1882 (*z*), a married woman held any copyhold which was her separate property under the Act, and the rents and profits thereof, as a *feme sole*.

A special custom was required to entitle a husband to curtesy of or to give a wife any interest after her husband's death in copyholds. In the latter case such interest was termed **free-bench,** and was usually a life interest in one divided third and was paramount to the husband's debts. It did not usually attach until the death of the husband, and might be defeated by a devise of the lands. It was not governed by the Dower Act, 1894. And now, although all copyhold is enfranchised and cannot be

(*z*) *Ante*, p. 70.

subject to any custom relating to dower or freebench or tenancy by the curtesy, this provision does not apply to any person married before 1926 unless, in case of dower or freebench, the husband, or in a case of curtesy, the wife, dies after that date, but where any right to freebench has attached before 1926 and cannot be barred by testamentary or other disposition of the husband, such right shall, unless released, remain in force in equity.

Sect. III.—*Of the Alienation of Copyholds.*

Alienation was effected by **surrender** into the hands of the lord and **admittance** by him of the alienee. Originally this must take place in the Customary Court of the manor, to constitute which at least two copyholders were necessary, or if made out of Court, *presentment* of the transaction must be made by the *homage* (*i.e.*, the copyholders present) at a subsequent Court.

By the Copyhold Acts of 1841 and 1894, Customary Courts might be held without the presence of any copyholder; presentment by the homage was also rendered unnecessary, and a simple entry of a surrender on the Court rolls sufficed.

The surrender was made to the lord to the use of the alienee for any estate which it might be wished to convey; if made in Court it was entered on the Court rolls, a copy of which was given to the purchaser as a muniment of his title; if made out of Court a memorandum in writing was signed and entered on the Court rolls.

On surrender, the surrenderor continued tenant to the lord until the admittance of the surrenderee, who had a right to procure admittance, and then became at once tenant to the lord and was bound to pay the customary fine. The admittance related back to the surrender, and would displace the previous admittance of a subsequent surrenderee. Admittance must formerly be within a manor, but by the Copyhold Act, 1894, might be made by the lord or the steward out of the manor without holding a Court.

Alienation by **will** was formerly effected by surrender to the use of the will. The will formed part of the surrender, and no particular form was necessary. By 55 *Geo. III. c.* 192, a devise

was rendered valid without any previous surrender to the use of the will. By the **W. A., 1837,** a will of copyholds must be executed in the same way as one of freeholds. Originally the devisee, before admittance, was required to make a *presentment* of the will at the next Customary Court after the death, but after the Copyhold Act, 1841, the mere delivery of a copy of the will to the lord or steward was sufficient to authorise its entry on the Court rolls, and the devisee might be admitted at once.

The **St. Uses** had *no application to copyholds*. A person did not, by surrender of copyhold to his *use*, obtain the seisin, which remained always in the lord. But where a surrender was made to the *use* of any person, the lord was merely an instrument for effecting the alienation, and his title was immaterial. If, however, a surrender be made for one person to the use of another on trust for a third, the surrenderee was compelled to perform the trust as in case of freehold. This method was adopted in settlements of copyhold estates in which equitable estates might be created, as in freeholds.

An equitable estate tail in copyholds might be barred by deed in the same manner as freehold, the deed being entered on the Court rolls of the manor.

On death of a sole trustee of copyholds who has been admitted, his estate did not devolve on his personal representatives like freehold, but on his customary heir. Equitable estates in copyhold were subject to the L. T. A., 1897 (*a*).

The owner of an equitable estate in copyholds was not himself a copyholder and, subject to certain exceptions, could not himself be admitted or surrender, his trustee being the tenant to the lord.

Sect. IV.—*Of the Enfranchisement of Copyholds.*

If the fee simple of a copyhold tenement were conveyed by the lord to the tenant the copyhold tenure was extinguished. So when a manor of which lands were held by copy was included in a settlement, it was usual to give to any tenant for life a power to convey the fee simple so as to enfranchise any such land. And

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(*a*) *Re Somerville and Turner*, [1903] 2 Ch. 583.

by the S. L. A., 1882, statutory powers of enfranchisement were given to a life tenant.

By the Copyhold Act, 1894, provisions were made both for compulsory and voluntary enfranchisement.

By the **L. P. A., 1922** (*b*) (which came into operation on January 1, 1926) every parcel of copyhold land was enfranchised and became freehold and (subject to certain temporary provisions) free from all customs and manorial incidents.

The term "copyhold" includes (i.) customary freehold, where the freehold is in the *lord*; (ii.) land of copyhold tenure held for life or lives or years where the tenant has by custom a perpetual right of renewal; (iii.) land so held in free tenure subject to custom (*c*).

Where at the commencement of the Act there was subsisting a mortgage of the customary estate of inheritance, the mortgagee acquired a legal term of years absolute in the enfranchised land subject to a proviso for cesser corresponding to the right of redemption subsisting under the mortgage (*d*).

Where at the commencement of or by virtue of the Act the land is subject to any subsisting lease or demise for a term of years absolute, the freehold into which the copyhold is converted becomes the reversion expectant on such lease or demise (*e*).

In the absence of agreement, enfranchisement under the Act does not deprive the tenant of any commonable right or affect any right of the lord or tenant to mines or minerals or affect any existing liability for the construction, maintenance, &c., of any dykes, ditches, sea or river walls, bridges, ways, &c., or other works required for the protection or benefit of any land within a manor (*f*).

Escheat is abolished, but in place thereof the Crown may become entitled to the land as *bonâ vacantia* (*g*).

Upon enfranchisement the freehold estate in fee simple vested in the copyholder in fee simple (*i.e.* the person admitted in respect of the inheritance), not being a mortgagee, or, if there was no copyholder in fee, the person who immediately before 1926

(*b*) Section 128.
(*c*) Section 189.
(*d*) Sched. 12, para. 1.
(*e*) *Id.*, para. 3.
(*f*) *Id.*, para. 6.
(*g*) Section 46.

had the best right to be admitted, otherwise than as a mortgagee (*h*). And where the copyhold land was subject to interests affecting or derived out of the copyhold fee simple which are after 1926 capable of subsisting as legal estates, the persons entitled to such interests acquire a corresponding legal estate in the enfranchised land (*h*). But where copyhold was held for life or lives or for years and the tenant had at the commencement of the Act a perpetual right of renewal, the freehold estate in fee simple vested in the person who at the commencement of the Act was the admitted tenant, or had the best right to be admitted tenant, in respect of the renewable interest (*i*).

To ensure *compensation* to the lord *for the loss of the manorial incidents* the following are temporarily kept alive until extinguished as provided for by the Act:—

(i.) Quit rents, chief rents and other similar rents and payments;

(ii.) fines, reliefs, heriots and dues;

(iii.) forfeitures other than forfeitures for the conveyance or attempted conveyance of an estate of freehold in the land and for alienation without licence (*k*).

As long as these incidents are alive in respect of any enfranchised land, any assurance thereof or of any interest therein is void unless it is produced to the steward of the manor within six months after its execution (or such further time as the Court may allow) and all fines, reliefs and heriots and all quit or other rents, together with the prescribed fees, are paid (*l*).

The *extinguishment of manorial incidents* so kept alive takes place—

(i.) upon the execution, before 1936, of a written agreement between lord and tenant as to the compensation;

(ii.) upon service, after 1930 and before 1936, by the lord upon the tenant of a notice requiring the ascertainment of such compensation or upon service of such notice by the tenant upon the lord at any time before 1936;

(iii.) In the absence of such agreement or notice on January 1, 1936. But in manors where there are not less than

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(*h*) Sched. 12, para. 8.
(*i*) *Ibid.*, and ss. 128, 135.
(*k*) Sections 128, 130, 131, 132.
(*l*) Section 129.

1,000 tenants holding land affected by manorial incidents this last period may be extended by the Minister of Agriculture and Fisheries on the application of either lord or tenant (*m*).

The lord and the tenant must furnish to the Minister any information in their possession which may be reasonably required with a view to ascertaining the *compensation*; no compensation is to be paid to the lord for loss of any right to forfeiture, except as provided for by Part II. of the Thirteenth Schedule to the Act, nor for any advantage accruing to the tenant by the extinguishment of any other incident except to the extent of any corresponding loss to the lord; unless the compensation is, within thirty days after its ascertainment, paid in a gross sum, it is (unless the parties otherwise agree) payable by twenty equal annual instalments, with interest at 5½ per cent., and the payment of any unpaid instalments or interest is secured by a terminable rent-charge issuing out of the land and varying in proportion to the amount unpaid; any *valuation* required to be made for assessing compensation must, unless the parties agree, be made by a single valuer appointed (in default of agreement between the lord and tenant) by the Minister of Agriculture and Fisheries (*n*).

Even where, in the absence of agreement or notice, the manorial incidents are automatically extinguished on January 1, 1936, the lord may at any time within the next five years apply to the Minister to determine the compensation (*o*).

CHAPTER XXI.

OF A TERM OF YEARS.

Terms of years are (i.) those created by ordinary leases subject to a yearly rent; (ii.) long terms created under settlements, wills or mortgages, in which no rent is usually reserved, and the object of which is to secure the payment of money by the owner of the land. All terms of years of whatever length possess the same attributes.

(*m*) Section 138. (*n*) Section 139. (*o*) Section 140.

A term of years absolute is one of the only two corporeal estates in land which can now exist. The expression "term of years" includes for this purpose a term for less than a year, or for a year or years, and a fraction of a year, or from year to year (*p*), and, therefore, apparently might include a quarterly, monthly or weekly tenancy, though not a tenancy at will or on sufferance. To be a legal estate it is not necessary that the term of years should be in possession (*q*). A term may be absolute although liable to be determined by notice, re-entry, operation of law or (in case of a term created by mortgage) by a provision for cesser on redemption, but a term of years determinable with a life or lives or with the cesser of a determinable life interest is not a term of years absolute (*r*).

A **tenancy at will** may be created by parol or deed. The lessee may be turned out at his landlord's pleasure, or leave at his own; he is not answerable for permissive waste, and has a right to emblements. A lease at an annual rent made generally without expressly stating it to be at will, and without limiting any certain period, is not a lease at will but from year to year.

A **tenancy by sufferance** arises where a person who came into possession by a lawful title holds on after its determination.

In a **lease from year to year** both landlord and tenant are entitled to *notice* which, at C. L., must [subject to any contrary agreement] be given at least half a year before the expiration of the current year (*s*).

But by the **Agricultural Holdings Act, 1923,** a notice to quit a "holding" (*t*) within the Act is invalid, notwithstanding any contrary agreement, if it purports to terminate the tenancy before

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(*p*) L. P. A., 1925, s. 205.

(*q*) *Ibid.*

(*r*) *Id.*, s. 149.

(*s*) This rule does not apply to monthly tenancies which may be determined by reasonable notice not necessarily expiring with some month of the tenancy; it is uncertain whether it applies to weekly tenancies.

(*t*) This term does not include an allotment garden nor does it include land cultivated as a garden, unless so cultivated wholly or mainly for the business of market gardening, but, save as aforesaid, it includes any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord

the expiration of twelve months from the current year of tenancy. But this provision does not apply where a receiving order in bankruptcy is made against the tenant; nor to any notice given by the Admiralty, War Department, or Air Council, where possession is required for naval, military, or air force purposes; nor to any notice given by a railway or canal, &c., corporation in respect of land acquired for the purpose of its undertaking, or by a Government department or local authority where possession is required for the purpose (not being the use of the land for agriculture) for which the land was acquired by such corporation, department or authority; nor to any notice given in pursuance of the contract of tenancy authorising the resumption of the holding or any part thereof for some purpose other than the use of the land for agriculture; nor to any notice given by a tenant to a sub-tenant; nor to any notice given before 1921 (*u*).

In the case of a tenancy of a holding for a term of two years or upwards, granted or agreed to be granted on or after January 1, 1926, the same Act provides (*x*) that notwithstanding any agreement to the contrary the tenancy shall not terminate on the expiration of the term for which it was granted unless not less than one year or more than two years before the date fixed for its expiration a written notice has been given by either party of his intention to terminate the tenancy; if no such notice is given the tenancy will continue as a tenancy from year to year, but otherwise on the terms of the original tenancy so far as they are applicable.

The Act further provides (*y*) that with a view to the use of the land for certain specified purposes the landlord may give to a tenant from year to year notice to quit *part* of the holding. But except where the landlord gives such notice in pursuance of an agreement contained in the contract of tenancy the tenant may, within twenty-eight days after service of the notice, serve on the landlord a notice in writing accepting the latter's notice as a notice to quit the entire holding at the expiration of the current year of the tenancy.

A lease of a separate *incorporeal* hereditament always required

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(*u*) Section 25.
(*x*) Section 23.
(*y*) Section 27.

a deed, and by the **L. P. A., 1925** (*z*), a lease required by law to be in writing of any tenements or hereditaments is void *at law* unless made by deed. But such a lease may be valid as an agreement to grant a lease, and since the Judicature Acts a tenant under an agreement for a lease *which he might enforce specifically in equity*, is to be treated in Courts which have jurisdiction to enforce specific performance of the contract as if he were tenant at law upon the terms of the agreement, and is practically in the same position as if he had a lease by deed (*a*).

No formal words are necessary to make a lease for years. There is no limit to the number of years for which it may be granted, but it must have a time fixed at which it is to begin—which may be a future time—and a time fixed for its ending, so as to make it a *term* as distinct from a freehold. Thus a lease to A. for 99 years, if he shall so long live, gives him merely a term of years, and after January 1, 1926, such a lease at a rent or in consideration of a fine, whether made before or after that date, takes effect as a lease for *ninety* years, determinable after A.'s death by at least one month's notice in writing terminating on one of the usual quarter days (*b*).

At C. L. no time was limited within which a lease to commence *in futuro* must begin, and it was held that such a lease was not governed by the rule against perpetuities. Now, however, subject to the rule that a legal term may be created to take effect in reversion expectant on a legal term, a term at a rent or in consideration of a fine limited after 1925 to take effect more than twenty-five years after the date of the instrument creating it, and any contract made after that date to create such a term is void (*c*).

Leases of land in Middlesex or Yorkshire, with certain exceptions, require *registration* in the same manner as conveyances of freeholds. Leases for forty years or more in districts where regis-

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(*z*) *Ante*, p. 45.

(*a*) *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608.

(*b*) L. P. A., 1925, s. 149. But this does not apply to any term taking effect in equity under a settlement, or created out of an equitable interest under a settlement for mortgage, indemnity, or other like purposes (*ibid.*).

(*c*) *Ibid.* This provision also does not apply to the terms mentioned in the last note.

tration is compulsory on sale do not pass any legal estate to the transferee until he is registered. This does not, however, apply to terms created for mortgages nor where the lessees are trustees of a settlement for the purpose of the Settled Land Acts, provided, in the latter case, that the life tenant is registered.

Before 1926 the lessee had in general no *estate* before entry on the land, but merely an *interesse termini*, or right to the term. But where the lease was made by any conveyance under the St. Uses, the term vested in the lessee at once without entry. Now, by the **L. P. A., 1925** (*d*), the doctrine of *interesse termini* is abolished and all terms of years absolute, whether created before or after 1926, take effect at law or in equity from the date fixed for the commencement of the term, without actual entry.

If A. by deed leases to B. lands in which he has no interest, both A. and B. are during the term *estopped* from denying its validity. If, then, A. at any time during the lease acquire such lands, the lease takes effect out of his estate and becomes a regular estate for a term of years. But if A. had *any* interest in the land only such interest passes, and the lease will have no further effect by estoppel.

A tenant for a term of years has a true property in his holding, and has the right to possession against everyone. He may dispose of his interest by *assignment* of the whole, or by granting an *underlease* for a shorter term than his own, unless his lease has contained a covenant not to assign or underlet. But a covenant not to assign is not broken by the devolution of the term by law. And dispositions made in breach of a covenant not to assign or underlet are not void, but they are defeasible, where the lease is determinable by a condition of re-entry for breach of covenant, upon the landlord's entry under such condition.

He is, in the absence of agreement, liable for voluntary waste, and in respect of permissive waste is bound to keep the premises wind and water tight. His rights are, however, usually regulated by express covenants, *e.g.*, as to repair, painting, mode of cultivation (*e*) and use of premises.

(*d*) Section 149.

(*e*) The effect of such covenants is now, however, restricted by the Agricultural Holdings Act, 1923 s. 30.

Under an agreement to take a lease with **"usual" covenants,** the lessor cannot insist on more than covenants (i.) to pay rents; (ii.) to pay taxes, except those expressly payable by the lessor; (iii.) to keep and deliver up in repair; (iv.) to allow lessor to enter and view repairs. And the lessor is entitled to have a condition for re-entry on non-payment of rent, but not on breach of other covenants. And the lessor is only bound to enter into the usual qualified covenant for quiet enjoyment.

As a matter of contract, the covenants of the lessor and of the lessee remain binding on them for the whole term, in spite of any assignment; hence, on a sale by the lessee, the purchaser is bound to covenant to indemnify him against any breach of covenant. Even without such a covenant an assignee must indemnify the lessee for any breach of covenant while he remains entitled to possession; on assignment his liability before 1926 passed to his assignee, but now, by the **L. P. A., 1925** (*f*), there is on any assignment for valuable consideration an implied covenant by the assignee to pay the rent and observe the covenants, and indemnify the assignor in respect thereof.

Any assignee is liable to the *landlord* for the rent, and for breach of *covenants running with the land* while the term is vested in him. Such covenants are (i.) covenants relating to the premises let; (ii.) covenants to do any act on the premises, provided, before 1926, that the lessee covenanted for himself and his assigns; after 1925 a covenant relating to any land of the covenantor is deemed to be made on behalf of his successors and assigns unless a contrary intention is expressed, and this provision applies to a covenant to do some act relating to the land, although the subject matter is not in existence when the covenant is made (*g*). But covenants to do any act on premises not included in the lease cannot bind the assignee. The *benefit* of covenants relating to the land entered into by the lessor will pass to the assignee by virtue of his *privity of estate* with the lessor. This right was confirmed by 32 *Hen. VIII. c.* 34, which also enabled the assignee of a *reversion* to take advantage of covenants entered into by the

(*f*) Section 77; Sched. 2, Parts I. and II.
(*g*) L. P. A., 1925, ss. 79, 80.

lessee (*h*). The C. A., 1881, contained further provisions on this point, now superseded by the **Law of Property Act, 1925,** which provides that in leases, whether made before or after January 1, 1926—

(i.) the rent and the benefit of the lessee's covenants, having reference to the subject-matter of the lease, are annexed to the immediate reversionary estate, without prejudice to any liability affecting a covenantor and his estate, and may be apportioned on severance of the reversionary estate (*i*);

(ii.) the obligation of the lessor's covenants with reference to the subject-matter of the lease is laid on the immediate reversionary estate and the person entitled thereto, so far as the lessor has power to bind them, and if the reversionary estate is severed a like obligation is allotted to the several parts thereof (*k*).

These provisions do not, however, apply to leases made without any instrument in writing.

Re-entry on breach of covenant, *other than the covenant to pay rent* (*l*), is now governed by the **L. P. A., 1925** (*m*), re-enacting the C. A., 1881, and providing that a right of re-entry or forfeiture is not enforceable unless the lessor has served on the lessee a notice specifying the breach, and requiring it to be remedied if capable of remedy, and compensation to be made, and the lessee has failed to comply with the notice. And where a lessor is proceeding to enforce his right of re-entry, *but not after he has actually recovered*, the Court may grant relief against such forfeiture (*n*).

(*h*) This provision was held to apply only *at law* in the case of leases made by deed; but where the tenant is in possession under an agreement which is specifically enforceable, the assignee of the reversion could sue him on any covenants, as if a lease by deed had been granted; and at C. L. an assignee of the reversion may sue the tenant upon agreements implied by law on his part. See *Rickett* v. *Green*, [1910] 1 K. B. 253; *Wedd* v. *Porter*, [1916] 2 K. B. 91; *Blane* v. *Francis*, [1917] 1 K. B. 252.

(*i*) Section 141.

(*k*) Section 142. But if the lease was made after 1882 the operation of the severance of a reversion before 1882 is not affected.

(*l*) *Ante*, p. 83.

(*m*) Section 146.

(*n*) See *Rogers* v. *Rice*, [1892] 2 Ch. 270.

These provisions do not extend to covenants against assigning, underletting, &c., where the breach occurred before 1926, nor to certain covenants in mining leases; and, where there is a condition for forfeiture on the lessee's bankruptcy, or the taking in execution of his interest, such a condition is (except in certain specified cases) only to be excepted from the operation of these provisions after one year from the date of the bankruptcy, &c., and provided the lessee's interest be not sold within the year.

A right of entry was at C. L. indivisible, and was destroyed by the lessor giving the lessee any licence to commit any breach of covenant, or by his waiver of the right after breach. But by *Lord St. Leonards' Act*, 1859, it was provided that a licence should extend only to the particular act licensed, and by an amending Act of 1860 that a waiver should apply only to the particular breach waived, and these Acts are now re-enacted by the L. P. A., 1925 (*o*).

For the same reason the grantee of part of a reversion could not at C. L. take advantage of a condition of re-entry. A remedy was provided for this by Ld. St. Leonards' Act, as far as concerns covenants for payment of rent, provided that the rent was legally apportioned; and now the **L. P. A., 1925** (*p*), re-enacting the C. A., 1881, provides that every right of re-entry and condition contained in leases made after 1881 shall, on severance of the reversionary estate, become annexed to the several parts thereof. The term "right of entry" in this section includes a right to determine a lease by notice or otherwise, but where notice is served by a person entitled to a severed part of the reversion, the lessee may within one month determine the lease in regard to the rest of the land by giving the owner of the reversion a counter-notice expiring at the same time as the original notice. Where the lease was made before 1882 and the severance was effected before 1926, the old law still applies.

By the St. Frauds writing was required to *assign* a lease not being a copyhold or customary interest, and by the R. P. A., 1845, an assignment of any chattel interest, not being copyhold, in any lands or hereditaments was required to be by deed. These provi-

(*o*) Sections 143, 148.
(*p*) Section 140.

sions are in substance re-enacted by the **L. P. A., 1925** (*q*), which provides (i.) that subject to certain exceptions, no interest in land can be disposed of except by writing signed by the person conveying it, or by his agent authorised in writing, or by will, or by operation of law; (ii.) that all conveyances of land or any interest therein are void for the purpose of conveying a legal estate unless made by deed. Assignments of leases require *registration* to the same extent as the leases themselves.

Leaseholds, being chattels, could always be disposed of by *will*, and devolved on the executors or administrators like other personalty.

By the **W. A., 1837,** a general devise of the *land* of the testator, and any general devise which would describe leasehold if the testator had no freehold which could be described by it, will include leaseholds, unless a contrary intention appears by the will.

Leaseholds could always be taken in execution for debt in the lifetime of the debtor, or made liable after his death, like his other chattels. The effect of a judgment as a *charge* on leaseholds is now governed by the **A. E. A., 1925,** re-enacting the L. C. A., 1900 (*r*). On bankruptcy they vest in the trustee, subject to his right of disclaimer.

An **underlease** is any grant for less than the whole term. Any assurance of the whole is an **assignment.**

An underlessee is tenant to his immediate, and not the original, lessor. Between the latter and an underlessee no privity exists, either of contract or estate, since the estate of the underlessee is a new and distinct term. He cannot, therefore, sue the underlessee for any breach of the covenants of the original lease, except covenants restricting the use of the land (*s*).

Goods of an under-tenant—unless he is a mere lodger (*t*)—were liable at C. L. to distress for the rent due under the head lease; he may also be ejected by the superior landlord if the head lease be determined by re-entry. But he is entitled to the same relief

(*q*) Sections 52, 53.

(*r*) *Ante*, p. 65.

(*s*) See *Patman* v. *Harland*, 17 Ch. D. 353. But in case of a lease after 1925 the lessee is not deemed to have constructive notice of his lessor's title.

(*t*) *Ante*, p. 83.

against forfeiture for non-payment of rent as the lessee (*u*); and by the **L. P. A., 1925** (*x*), re-enacting the C. A., 1892, where a lessor is *proceeding* to enforce any right of re-entry or forfeiture under any covenant in a lease or for non-payment of rent, the Court may, on the application of the underlessee, make an order vesting in him, on such conditions as it may think fit, the property comprised in the lease for the whole or any less term. Under this Act an under-tenant may be relieved where the lessee would be without remedy—*e.g.*, on breach of a covenant not to assign, or to pay rent (*y*).

Underleases and assignments thereof require registration to the same extent as leases and assignments of leases from a freeholder, and are governed in the same way by the L. R. A., 1925.

A husband might at C. L. dispose of his wife's term of years during the coverture, and if he survived he took it *jure mariti*. But if he died first it survived to her, unaffected by his will. He had similar rights over the wife's *equitable* interest in a term of years, subject to her *equity to a settlement*. But if there were a trust for her separate use she could dispose of her interest as a *feme sole* as she can now, if it is her separate property, under the M. W. P. A., 1882. Until 1926, however, if she made no disposition thereof in her life or by her will, her husband became entitled thereto at her death *jure mariti*, without taking out letters of administration (*z*). Now, however, by the **A. E. A., 1925** (*a*), every estate and interest of a husband in real estate and chattels real as to which his wife died intestate is abolished.

Renewable Leases.—Sometimes fresh leases are granted before the expiration of existing leases; in others, there is a covenant to renew the lease on payment of a fine, but after 1925 a covenant to renew a lease for a term exceeding sixty years from the termination of the original lease is void (*b*). The acceptance of a new lease operates as a surrender of the old; and if a new lease is

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(*u*) *Ante*, p. 84.
(*x*) Section 146.
(*y*) *Wardens of Cholmeley School* v. *Sewell*, [1894] 2 Q. B. 906; *Gray* v. *Bonsall*, [1904] 1 K. B. 601.
(*z*) See *Surman* v. *Wharton*, [1891] 1 Q. B. 491.
(*a*) Section 45.
(*b*) L. P. A., 1922, s. 145.

granted to another person by the consent of the tenant who gives up possession, this is an implied surrender (*c*). If a trustee obtains a renewal of a lease he is a constructive trustee thereof for the *c. q. t.*

It has hitherto been possible to word a covenant in a lease so as to give the lessee a perpetual right of renewal. But by the **L. P. A., 1922** (*d*), any grant after 1925 of a lease with such a covenant operates as a demise for 2,000 years, and where on January 1, 1926, there was existing a perpetually renewable lease it became a term of 2,000 years from the commencement of the original term. A long term so created is subject to all the same trusts, powers, rights, equities, &c., as the original term, and the rent, covenants and conditions are payable and enforceable in the same way; [but the lessee under the long term, even if he be the original lessee, is liable only for rent accruing and breaches of covenants or conditions occurring while the term is vested in him or his P. R.]. Every lease which under the Act takes effect as a term for 2,000 years is deemed to contain (i.) a power for the lessee by giving ten days' notice in writing to determine the lease at any date at which, but for the Act, it would have expired apart from renewal; (ii.) a covenant by the lessee to register every assignment or devolution of the term with the lessor or his solicitor within six months from its date; (iii.) a covenant by the lessee within one year from January 1, 1926, to produce his lease or sufficient evidence thereof to the lessor or his solicitor, who, if the right of perpetual renewal is admitted or proved, must endorse notice of that fact on the lease or copy; any proviso for re-entry applies to these implied covenants. Where a fine is payable for renewal it is converted into additional rent.

Improvements.—Before 1876 the tenant of an agricultural holding had no right to compensation for improvements, except by express agreement or under a local custom. Now, by the **Agricultural Holdings Act, 1923** (*e*), re-enacting the Agricultural Holdings Act, 1908, a tenant of a holding to which the Act

(*c*) *Wallis* v. *Hands*, [1893] 2 Ch. 75.

(*d*) Section 145 and Sched. 15.

(*e*) Where the contract of tenancy was made after 1925 compensation may be obtained whether or not the improvement was one which the tenant was bound to make.

applies (*f*) may obtain compensation (1) for the erection of buildings and specified permanent improvements if executed with the previous consent of the landlord or his tenant; (2) for drainage if he has given the landlord notice of his intention to execute such improvements; (3) for manuring and similar improvements though the landlord's consent has not been obtained. In the last case fair compensation, payable under an agreement in writing entered into before January 1, 1921, may be substituted for compensation under the Act. The Act also contains provisions enabling a quitting tenant to claim compensation where he can prove that the value of the holding has been increased during the tenancy by a standard or system of farming more beneficial than any standard, &c., required by the contract of tenancy; conversely, the landlord may claim compensation for deterioration through the bad farming of the tenant or his breach of the terms of the contract; the tenant is also given compensation for damage by game and for disturbance. Subject to the Act any contract depriving a tenant of his right to compensation is void (*g*).

A landlord paying compensation may obtain from the Minister of Agriculture and Fisheries an order charging the land with repayment of the amount with interest (*h*). Such a charge should be registered at the Land Registry as a land charge.

Under the Increase of Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1925, landlords are prohibited from raising rent or recovering possession of a dwelling-house within the Acts, except as therein provided.

Long Terms of Years.—In settlements, long terms are often created to secure payment of money (*e.g.*, portions for younger children) without affecting the ownership of the property. The term—say of 1,000 years—is vested in trustees on trust out of the rents and profits, or by sale or mortgage thereof, to raise the money required and subject thereto on trust to permit the owners of the land to receive the rents and profits.

Usually in such case there is a **proviso for cesser,** *i.e.*, that if the money is duly paid the term shall become extinguished.

It might also become extinguished by being surrendered by the trustees to any owner of the freehold. The smallest freehold

(*f*) *Ante*, p. 119. (*g*) Section 50. (*h*) Section 20.

is larger than the longest term; if, therefore, even a life tenant of the land became possessed of the term without any vested estate intervening, it would merge in his life estate, which would become no larger thereby. At law, though not in equity, merger would occur in spite of any trusts, *e.g.*, if the trustees purchased the freehold; but the Judicature Act, 1873, provided that no merger should occur in law where there was none in equity, and this is now re-enacted by the L. P. A. 1925 (*i*).

If the term was not extinguished by merger, or under a proviso for cesser, it might be kept on foot for the benefit of the owner of the property for the time being. A purchaser of the freehold might have the term assigned to a trustee for him and his heirs and assigns, or, as it was said, *in trust to attend the inheritance*. He would thus gain protection against any incumbrance which, unknown to him, the vendor might have created upon the land since the term, and which could only take effect subject to the term. If, however, the purchaser at the time of purchase knew of the incumbrance, he could not defeat it in this way unless it was merely a right of dower which had attached to the lands. If a term were neither surrendered nor assigned to a trustee to attend the inheritance, it was still considered to be attendant on the inheritance for the benefit of all persons entitled to the inheritance.

By the **L. P. A., 1925** (*k*), which supersedes the Satisfied Terms Act, 1845, it is provided (i.) that where the purposes of a term created out of freehold become satisfied, either before or after the commencement of the Act, the term shall merge in the reversion and cease; (ii.) that where the purposes of a term created at any time out of leasehold land become satisfied after 1925, that term shall merge in the reversion expectant thereon and cease; (iii.) that where the purposes are satisfied only as respects part of the land comprised in a term the Act will have effect as if a separate term had been created in that part of the land.

By the **L. P. A., 1925** (*l*), replacing the C. A., 1881, where land is held for an unexpired residue of not less than 200 years of a term originally not less than 300 years, without any trust or right of redemption in favour of the freeholder or other reversioner, and

(*i*) Section 185. (*k*) Section 5. (*l*) Section 153.

without any rent or merely a rent of no money value, or having a rent which has ceased to be payable (and for this purpose a rent not exceeding £1 a year is deemed to have ceased to be payable if it has not been paid for a continuous period of twenty years, of which at least five years elapsed after 1925) may be enlarged into a fee simple by a declaration by deed made by (i.) any person beneficially entitled thereto, and, in the case of a married woman, without the concurrence of her husband; (ii.) any person in receipt of the income as trustee or having the term vested in him for sale; (iii.) any person in whom it is vested as P. R. The fee simple so acquired is subject to the same trust powers, exexcutory limitations over, covenants and obligations as the term. Such a term may be enlarged, although it has not the freehold as the reversion thereon, but not if liable to be determined by re-entry on breach of condition, or if created out of a term itself incapable of enlargement.

CHAPTER XXII.

OF A MORTGAGE OF LAND.

A MORTGAGE is the conveyance of land or other property as security for the payment of money. In early law a pledge of land was effected by a conveyance to the creditor to hold until the debt was paid, either applying the profits and rents to payment thereof, or taking them in lieu of interest, the latter being termed a *mortuum vadium* (*mort gage*).

Later, the land was given in pledge, with a proviso that on non-payment it should remain to the creditor in fee. Then it became the custom to enfeoff the creditor in the first instance with a proviso for re-entry on payment. A mortgage therefore became a conveyance of land for an estate to be determined on repayment by a certain day. And at *law* if it was not so paid, the estate of the person to whom it was conveyed became absolute. But in *equity*, a mortgagor on paying all that was due was allowed to redeem his estate after the legal day of payment. This principle of the mortgagor's *equity of redemption* was completely settled *sub* Charles II., when it was laid down that a conveyance

made as a security for money should always be considered in equity a mortgage and redeemable in spite of any agreement to the contrary. Hence the phrase "once a mortgage aways a mortgage." It was also held that any attempt to "clog" the equity of redemption with any other condition than the payment of principal, interest and costs was void (*m*).

Further, it was held that in equity the right of the mortgagee was to the money secured, that he held the land only as a security, and had merely a *charge* on it, though at law he were absolute tenant in fee. And though at law the estate of a mortgagee in fee went to his heir or devisee, in equity it was considered personalty, and he was merely a trustee of it for the executor or administrator. Conversely, the mortgagor was in equity considered as the owner of the land subject to the mortgage, and his equity of redemption was treated as an equitable estate in the land. And, until 1926, on mortgage to secure a loan, the land is conveyed to the creditor with a proviso for reconveyance on payment of principal and interest at a specified date. There was also a personal covenant by the mortgagor for payment. Until the date specified the mortgagor had a legal right to redeem; afterwards he had merely an equity of redemption.

The **mortgagee** acquired the fee simple and seisin and an immediate right of entry, the mortgagor remaining in possession being strictly a tenant by sufferance. And the Courts of Equity would never restrain a mortgagee from taking possession. But if he did take possession, he was liable in equity to account strictly for the rents and profits and his management; hence possession was taken only as a last resource.

The **mortgagor,** if allowed to remain in possession, might take the rents and profits without any liability to account for them; he retained his right of free enjoyment, and was not liable for waste unless it was wanton destruction or impaired the value of the security. His equity of redemption was real estate in equity, and was alienable and devolved like other equitable estates.

(*m*) On these rules see *Salt* v. *Marquis of Northampton*, [1892] A. C. 1; *Biggs* v. *Hoddinott*, [1898] 2 Ch. 307; *Noakes* v. *Rice*, [1902] 2 A. C. 24; *Reeve* v. *Lisle*, *ibid.*, 461; *Bradley* v. *Carritt*, [1903] A. C. 253; *Samuel* v. *Jarrah, &c., Corporation*, [1904] A. C. 461; *Kreglinger* v. *New Patagonia, &c., Lim.*, [1914] A. C. 25.

By the **Law of Property Act, 1925** (*n*), a mortgage of an estate in fee simple can now be effected only by a demise for a term of years absolute or by a charge by deed expressed to be by way of legal mortgage (*o*), the mortgagee in the latter case having the same protection, powers and remedies as if a mortgage term for 3,000 years without impeachment of waste had been created (*p*).

The Act also provides (*q*) that any conveyance of an estate in fee simple by way of mortgage shall operate as a demise for a term of years absolute without impeachment of waste, a first or only mortgagee taking a term of 3,000 years, and a second or subsequent mortgagee taking a term (commencing from the date of his mortgage) one day longer than the term of the first or other mortgagee ranking immediately before him.

Similarly (*r*) all land immediately before January 1, 1926, vested subject to a right of redemption in a first or other mortgagee for an estate in fee simple in possession became on that date vested in such mortgagee for a term of 3,000 years subject to a provision for cesser corresponding to the existing right of redemption; and the estate in fee simple on that date vested, subject to the term, in the mortgagor or tenant for life, statutory owner, trustee for sale, P. R., or other person of full age who, if all the money then owing on the security of the mortgage and any other mortgages or charges had been then discharged, would have been entitled to have the fee simple conveyed to him (*s*).

Power of Leasing.—The mortgagor's equity of redemption being an estate in equity only, did not in general enable him to create any legal interest in the land, except under an express power given to him by the mortgagee, and operating under the St. Uses. But under the **L. P. A., 1925** (*t*), re-enacting the C. A., 1881 and 1911, a mortgagor, while in possession and so long as a

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(*n*) Section 85.

(*o*) But a special form of charge by way of legal mortgage may be made by a deed expressed to be made by way of statutory mortgage (section 117).

(*p*) Section 87.

(*q*) Section 85.

(*r*) Sched. 1, Part VII.

(*s*) Provision was, however, made for enabling a mortgagee whose estate was converted into a term of years absolute to convert the mortgage into a charge by way of legal mortgage.

(*t*) Section 99.

receiver has not been appointed by the mortgagee, has power to make an agricultural or occupation lease for not more than twenty-one years, or, if after 1925, fifty years, and a building lease for not more than ninety years, or, if after 1925, 999 years. These statutory powers may be excluded or enlarged by the mortgage deed or agreement in writing. The statutory powers apply to any mortgage made after 1881, but may be applied to mortgages before 1882 by agreement in writing between mortgagor and mortgagee made after 1881, without prejudice however to any mortgagee not joining in or adopting the agreement.

Actions.—At C. L. the mortgagor could bring no action to recover possession of the lands. But by the **L. P. A., 1925,** re-enacting the Judicature Act, 1873, a mortgagor entitled to possession or to the receipt of rents and profits may, with certain exceptions, sue in his own name for the recovery thereof, or to prevent or recover damages for any trespass or other wrong relative thereto, provided that the mortgagee has given no notice of his intention to take possession or enter into receipt of the rents and profits.

The **mortgagee's remedies** are: (1) In case of non-payment *to sue the mortgagor personally* on his covenant to repay. (2) *To foreclose, i.e.*, take proceedings in the Ch. D. for an account of principal and interest due, and that the mortgagor may be directed to pay with costs on a certain day, and in default may be foreclosed his equity of redemption. If payment is not made, an order for foreclosure follows, which vests in the mortgagee the fee simple, subject to any prior legal mortgage and extinguishes any subsequent mortgage. The Court may now in foreclosure proceedings order sale instead of foreclosure (*u*). (3) *To take possession.* (4) *To sell* under his power of sale, if he have one.

By the **L. P. A., 1925** (*x*), replacing the C. A., 1881, every mortgagee under a mortgage made *by deed* after 1881 has a power of sale. But he may not exercise it unless (1) notice requiring payment has been served on the mortgagor, and default has been made in payment of the mortgage money or part thereof for three months after service; **or** (2) some interest is two months

(*u*) L. P. A., 1925, s. 91, replacing C. A., 1881.
(*x*) Section 101.

in arrear; **or** (3) there has been a breach by the mortgagor of some provision contained in the mortgage deed or in the Act other than for payment of the debt or interest.

Under the Act of 1881, power was given to a mortgagee exercising his statutory power of sale to convey the property for such estate and interest as was the subject of the mortgage but, since a mortgagee now cannot have the fee simple, the L. P. A., 1925 (*y*), provides that, when he sells under his statutory or an express power of sale the conveyance shall operate to vest in the purchaser the fee simple in the land subject to any prior legal mortgage and such conveyance may be made in the name of the estate owner in whom the legal estate is vested. The mortgagee exercising this power can convey the fee simple freed from all estates and interests to which his mortgage has priority (*z*). The *proceeds of sale*, after the discharge of any prior incumbrance to which the sale is not subject or after payment into Court of a sum to meet any prior incumbrance must be applied (i.) in payment of all costs, charges and expenses; (ii.) in discharge of the mortgage debt, interests and costs; (iii.) the residue must be paid to the person entitled to the mortgaged property or authorised to give receipts for the proceeds of sale (*a*). These provisions may be varied, extended or excluded by the mortgage deed (*b*).

The L. P. A., 1925 (*c*), also provides that a mortgagee under a mortgage made by deed after 1881 may, when his statutory power of sale becomes exercisable, *appoint a receiver* and may under certain conditions insure against fire and cut and sell timber (*d*). If in possession, he may also grant the same leases as a mortgagor in possession, and they will be good against the mortgagor or prior incumbrancers (*e*).

Under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920—1925, the rights of a mortgagee to increase the rate of interest or to exercise his powers in respect of any mortgage to which the Acts apply have been much restricted.

(*y*) Section 81.
(*z*) Section 104.
(*a*) Section 105.
(*b*) Section 101.
(*c*) Sections 101, 109, replacing C. A., 1881.
(*d*) Sections 101, 108.
(*e*) Section 99. This power is exercisable after he has appointed a receiver, and so long as the receiver acts. *Ibid.*

Mortgagor's Remedies.—If he wish to pay off the mortgage after the day fixed, he must, as a rule, give the mortgagee six months' notice, or pay six months' interest. He can then require a reconveyance, and to enforce this or his right of redemption he may take proceedings for redemption in the Ch. D. In such proceedings the Court may order a sale (*f*).

Lapse of Time.—(i.) If a mortgagee has obtained possession the mortgagor can only redeem within twelve years thereafter, or twelve years after any written acknowledgment of his title or right to redeem has been given signed by the mortgagee (*g*); before 1926 the mortgagee having the legal fee simple, became then absolutely entitled to the land; now he may enlarge his term into a fee simple (*h*) or, in case of a charge by way of legal mortgage, may by deed declare that the fee simple is vested in him (*i*). (ii.) If the mortgagor remain in possession without paying principal or interest, or without giving any written and signed acknowledgment of the title or right of the mortgagee, the latter will similarly be barred from taking possession, or foreclosing, or suing for his money, at the end of twelve years from the time when his right of entry or right of action accrued.

Copyholds.—The mortgage of copyholds was effected by a surrender to the use of the mortgage, subject to a condition that on payment on a fixed day the surrender should be void.

If not so paid the mortgagee had at law an absolute right to be admitted to the customary estate surrendered to him, subject to the mortgagor's equity of redemption. If the mortgagee were admitted he must, on payment, surrender back to the use of the mortgagor. If he had not been admitted, a memorandum of his acknowledgment of satisfaction was inserted in the Court rolls.

All copyhold is now enfranchised and, in the case of mortgages subsisting on January 1, 1926, the mortgagee acquired a legal

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(*f*) L. P. A., 1925, s. 91, replacing C. A., 1881, s. 25. A mortgage or charge by way of legal mortgage may now be discharged by a receipt indorsed on the mortgage deed, but this does not affect the right of any person to require a re-assignment, and does not apply to a charge registered under the L. C. A., 1925.

(*g*) See *post*, p. 142.

(*h*) *Ante*, pp. 130, 131.

(*i*) L. P. A., 1925, s. 88.

term of years absolute in the enfranchised land comprised in his mortgage subject to a proviso for cesser corresponding to the right of redemption under the mortgage (*k*); if the mortgagee had been admitted, the freehold estate in fee simple vested, subject to the mortgagee's term of years, in the person entitled to the equity of redemption.

Leaseholds might, before 1926, be mortgaged (i.) by assignment, subject to proviso for re-assignment; (ii.) by sub-demise of a slightly shorter term, with a proviso for surrender on payment, and a declaration that the mortgagor should hold his reversion on trust for the mortgagee, subject to his equity of redemption. In the first case the mortgagee *was*, in the second he *was not*, liable to the original landlord for payment of the rent and performance of the covenants of the original lease.

Now, however, it is provided by the L. P. A., 1925 (*l*), that a mortgage of a term of years absolute can only be effected at law either by a sub-demise for a term of years absolute, less by one day at least than the term vested in the mortgagor, or by a charge by deed expressed to be by way of legal mortgage; and any purported assignment of a term of years absolute by way of mortgage will take effect as sub-demise for ten days less than the term expressed to be assigned. Where on January 1, 1926, there was subsisting a leasehold mortgage by assignment of a term of years absolute, the term so assigned re-vested in the mortgagor or other person who, on discharge of the mortgage, would have been entitled to it and the mortgagee took a term less by ten days than the term assigned to him (*m*).

Where the mortgagee sells under his statutory or an express power of sale, the conveyance conveys to the purchaser not only the mortgage term but also, unless excepted by leave of the Court, the leasehold reversion affected by the mortgage, subject to any legal mortgage having priority to the mortgage in right of which the sale is made. Similarly, if the mortgagee obtains a foreclosure order absolute it will vest in him the leasehold reversion, and if he acquires a title under the Limitations Acts he may

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(*k*) L. P. A., 1922, s. 128 (1), 12th Sched., (1) (f) (i).
(*l*) Section 86.
(*m*) *Ibid.*, Sched. 1, Part VIII.

by deed declare that the leasehold reversion shall vest in him free from any right of redemption which is barred (*n*).

Equitable Mortgages arise (i.) on the mortgage of an equity of redemption or other equitable estate; (ii.) where a legal owner of lands pledges them by writing without deed, or deposits the title deeds with the mortgagee. An example of an equitable *charge* occurs when lands are sold, but the purchase-money is not paid, in which case the *vendor* has a *lien* in equity on the lands for the amount unpaid, with interest at four per cent. The lien is not destroyed by taking a bond or note, but it is by taking a mortgage or independent security.

An equitable mortgagee has generally the same remedies as a legal mortgagee, qualified however by the fact that he has not the legal estate. Thus, if his mortgage is by deed he can exercise the statutory powers of appointing a receiver or of sale, though he cannot under his statutory power convey the legal estate to a purchaser; he can also foreclose unless he has a mere equitable charge, in which case he must apply to the Court for a sale.

By the L. P. A., 1925 (*o*), if an order for sale is made the Court may, in favour of a purchaser, make a *vesting order* conveying the land or may appoint a person to convey the land, or may vest in the mortgagee a legal term of years absolute to enable him to carry out the sale as if the mortgage had been created by deed by way of legal mortgage; and in an action for foreclosure the Court has power to order a sale.

A stipulation in a mortgage that on failure of punctual payment the rate of interest shall be increased is void, but a stipulation to diminish the interest on punctual payment is good.

Where money is advanced by several persons, it is in equity presumed to have been lent in equal shares, and on the death of one his share will pass to his executor or administrator. In a mortgage to trustees the trust is usually kept off the face of the mortgage deed, and to avoid the above rule it was usual to declare that the money was advanced by them on a joint account, and that on decease of one the receipt of the survivors should be a discharge. By the **L. P. A., 1925** (*p*), replacing the C. A., 1881, provisions having the effect of the joint account clause are in the

(*n*) L. P. A., 1925, s. 89. (*o*) Sections 90, 91. (*p*) Section 111.

absence of contrary agreement incorporated in every mortgage made after 1881, in which the money is expressed to be advanced by several persons on a joint account, or jointly and not in shares. By the same Act (*q*), trustee mortgagees who under the Statutes of Limitation or by foreclosure have become entitled to the mortgaged property, discharged from the right of redemption, are to hold it on trust for sale.

Subject to the L. P. A., 1925 (*r*), judgment debts are a charge on the interest of the mortgagee, but the charge ceases when the land is conveyed to a purchaser if the mortgage is paid off before or at the time of the conveyance (*s*).

Transfers of Mortgages are effected by assignment of the mortgage debt and interest to the new mortgagee, and a conveyance of the lands to him subject to the equity of redemption. Under the **L. P. A., 1925** (*t*), re-enacting the C. A., 1881, a mortgagor may compel a mortgagee who has not taken possession to assign the debt and convey the property to any third person.

The equity of redemption belonging to a mortgagor before 1926 might itself be mortgaged, and in such a case a mortgagee who obtained the *legal* estate had priority over all subsequent charges except those created by his authority as well as over any previous equitable charge of which he had no notice (*u*).

And a third or subsequent mortgagee who had no notice when he took his security of any but the first mortgage could, if he obtained a transfer of the legal estate of the first mortgagee, **tack** this to his own and squeeze out any intermediate mortgage (*x*).

As between themselves equitable charges as a rule, and in the absence of fraud or negligence, ranked in the order of their creation.

Now, however, all of a series of mortgages may be legal and, even where some are equitable, priority depends on the possession, not of the legal estate, but of the title deeds. As regards mort-

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(*q*) Section, 31, replacing the C. A., 1911

(*r*) *Ante*, p. 64.

(*s*) L. P. A., 1925, s. 195.

(*t*) Section 96.

(*u*) See *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231.

(*x*) *Taylor* v. *Russell*, [1892] A. C. 244; *Bailey* v. *Barnes*, [1894] 1 Ch. 25.

gages, legal or equitable, which do *not* carry possession of the title deeds, they may be registered under the **L. C. A., 1925,** and, by the **L. P. A., 1925** (*y*), rank according to the date of registration and the right to tack is abolished. Before 1926 a mortgagee who, having the legal estate, made a further advance without notice of an intermediate mortgage, had a first charge on the lands for the whole amount of his advances. Now by the **L. P. A., 1925,** a mortgagee has a right to make further advances to rank prior to subsequent mortgages, legal or equitable (i.) if an arrangement to that effect has been made with the subsequent mortgagee; (ii.) if, when he makes the further advances, he has no notice of the subsequent mortgages; (iii.) if, whether or not he had notice, the mortgage imposes on him an obligation to make such further advances.

Under the Middlesex Registry Act mortgages had priority according to the date of registration, except that a mortgagee who took the legal estate without notice and has registered had priority over previously registered equitable charges. Mere registration did not in Middlesex prevent tacking if a third mortgagee had not in fact notice of the intermediate mortgages. The Middlesex Act did not apply to equitable mortgage by deposit of title deeds without any writing, nor to a vendor's lien.

Under the Yorkshire Registry Act, 1884, registration gave absolute priority, except in case of fraud, in spite of actual or constructive notice, and tacking was impossible except as against interests created before the Act. Vendor's liens or charges created by deposit of title deeds had no effect or priority against registered assurances for valuable consideration unless registered under the Act.

Now, however, by the **L. P. A., 1925** (*z*), it is not necessary to register in any *local* registry any instrument made after 1925 unless it transfers or creates a legal estate or charge by way of legal mortgage, nor does registration of an instrument not required to be registered affect any priority; moreover, the rule that registration in Middlesex did not constitute notice is abolished and the **L. P. A., 1925** (*a*), provides (i.) that registration, *whether*

(*y*) Sections 94, 97.
(*z*) Section 11.
(*a*) Sections 197, 198.

in Middlesex or Yorkshire, of an instrument transferring or creating a legal estate or charge by way of legal mortgage shall constitute actual notice; (ii.) that registration under the L. C. A. 1925, or any Act which it replaces, in any register kept at the Land Registry or elsewhere shall constitute actual notice.

Mortgages of lands to which the title is registered under the L. R. A., 1925, will be dealt with later.

Mortgages and charges created by a company registered under the Companies Act, 1862 or 1908, must be registered with the registrar of companies.

Consolidation.—If A. mortgaged Blackacre to X. and then Whiteacre to X. for another debt, he could not redeem one without the other, and the mortgagee might enforce payment of both debts out of either property. The same applied if A. mortgaged Blackacre to X., then Whiteacre to Y., and subsequently both mortgages became vested in Z., unless the equity of redemption of one property was assigned by the mortgagor before both properties vested in Z. (*b*).

By the **L. P. A., 1925** (*c*), re-enacting the C. A., 1881, consolidation is not allowed where the mortgages, or one of them, are made after 1881, unless a stipulation to that effect is expressed in the mortgage deeds *or one of them*.

CHAPTER XXIII.

OF TITLE.

In English law all title to land is founded on possession. It is *primâ facie* evidence of seisin in fee, and a person in possession has a good title against all except those who can prove a better. And long possession may even bar the rights of the true owners and give the possessor a good title against all the world.

Actions for the recovery of land are governed by the **Real**

(*b*) *Vint* v. *Padget*, 2 De G. & J. 611; *Jennings* v. *Jordan*, 6 A. C. 698; *Harter* v. *Colman*, 19 Ch. D. 630; *Pledge* v. *White*, [1896] A. C. 187; *Sharp* v. *Rickards*, [1909] 1 Ch. 109.

(*c*) Section 93.

Property Limitation Acts, 1833 and 1874. No entry may be made or action brought by any person to recover land except within twelve years after the right to do so accrued to him or someone through whom he claims, or within twelve years after a written acknowledgment of his title has been given to him or his agent signed by the person in possession (*d*). A person under the disability of infancy or lunacy when his rights first accrued has a further extension of six years, but cannot claim after thirty years in all have expired (*e*).

The right to future estates accrues when they become estates in possession, but if the owner of the particular estate was not in possession when his estate determined, the owner of the future estate has either twelve years after the right of entry or action accrued to the particular tenant, or six years after it became vested in possession (*f*).

If the right of a tenant in tail is barred, so also is the estate of anyone whom the tenant in tail might have barred. If a tenant in tail die while time is running against him, no person claiming under such estate has more time than the tenant in tail would have had if he survived (*g*).

Equitable estates must, as a rule, be claimed within the same time as legal. Where, however, land is vested in a trustee on any express trust, the right of the *cestui que trust* is deemed to have accrued when the land is conveyed to a purchaser for valuable consideration, and then only against the trustee and any person claiming through him (*h*). But the Statutes of Limitations apply to actions by a *c. q. t.* against a trustee except where the claim is to recover the trust property, or the proceeds thereof, which have been retained or converted by the trustee or is in respect of any fraudulent breach of trust (*i*).

Rents (*k*) and tithes in the hands of laymen are subject to the same rules as land.

(*d*) 3 & 4 Will. 4, c. 27, ss. 2, 14; 37 & 38 Vict. c. 57, ss. 1-9.
(*e*) 37 & 38 Vict. c. 59, ss. 3-5. (*f*) 31 & 38 Vict. c. 57, s. 2.
(*g*) 3 & 4 Will. 4, c. 27, ss. 21, 22.
(*h*) 3 & 4 Will. 4, c. 27, ss. 24, 25, 26.
(*i*) Trustee Act, 1888, s. 8.
(*k*) *I.e.*, "rents existing as an inheritance distinct from the land, not rents reserved on leases for years by contract between the parties" (*Grant* v. *Ellis*, 9 M. & W. 113; and see *Hunter* v. *Nockolds*, 1 Mc. & G. 640).

For advowsons the period of limitations is three successive incumbencies, or one hundred years if they exceed that time, or sixty years if they do not amount to so much (*l*).

Money secured by a mortgage or otherwise charged on land can be recovered only within twelve years after the right accrued, or the last written and signed acknowledgment of the right thereto (*m*).

By 9 *Geo. III. c.* 16, all Crown rights are barred after sixty years.

Registered land is governed by special rules (*n*).

Prescription.—The title to purely incorporeal hereditaments depends upon *grant*, or on *prescription* from immemorial user (*i.e.*, user from the beginning of the reign of Rich. I), by which a grant is presumed. Immemorial user was presumed on proof of twenty years' enjoyment, but might be rebutted by evidence to the contrary. This rule still governs all cases not within the **Prescription Act, 1832.**

By this (i.) no right of common or *profit à prendre*, if enjoyed without interruption for thirty years before action, can be defeated merely by showing it was first enjoyed prior thereto, and if enjoyed for sixty years the right is indefeasible, unless it has been enjoyed under an agreement in writing (*o*); (ii.) for rights of way and other easements, watercourses and the use of water, the terms are twenty and forty years (*p*); (iii.) where light (*q*) is enjoyed with any building for twenty years without interruption, the right is indefeasible unless enjoyed under agreement in writing (*r*). The periods mentioned are in each case the periods *next before action*, and nothing is an interruption unless submitted to for one year after notice (*s*). The time during which a person is under incapacity, or during which any action is pending, is excluded from the above periods, save where the claim is

(*l*) 3 & 4 Will. 4, c. 27, s. 30.
(*m*) 37 & 38 Vict. c. 57, s. 8.
(*n*) *Post*, Chap. XXIV.
(*o*) Section 1.
(*p*) Section 2.
(*q*) See *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179; *Jolly* v. *Kine*, [1907] A. C. 1.
(*r*) Section 3.
(*s*) Section 4.

declared indefeasible (*t*). The Crown is barred by these provisions except in case of light.

Rights gained by prescription may be lost by abandonment, of which non-user for twenty years is generally sufficient evidence (*u*).

In former times a deed of feoffment usually contained a clause of warranty, and the word *give* had the effect of an implied warranty, which was, however, more limited in extent than the express warranty. Such clauses of warranty are now obsolete. In modern times every vendor of land is bound to show a good title, *i.e.*, evidence of ownership by himself and his predecessors for a number of years back. A vendor must therefore at his own expense furnish to the purchaser an *abstract of title*, verified by the production of the original documents, or their probate and office copies, showing the material parts of every instrument by which any disposition of the property was made during the time for which title has to be shown, and a statement of every birth, death, &c., or other event affecting its devolution.

The purchaser must, in the absence of contrary agreement, bear the expense of producing all documents of title and other evidence not in the vendor's possession, and of the examination of title deeds by his solicitor (*x*).

In the absence of stipulation to the contrary, recitals and statements contained in deeds or instruments twenty years old are, unless proved inaccurate, sufficient evidence of the facts therein stated (*y*).

Apart from special contract, the following **title** must be shown (*z*):—(i.) To freehold, thirty years. (ii.) To leasehold, the original lease and the title under the lease for not more than thirty years before the date of the contract; but *not* the title to the reversion, whether freehold or leasehold. (iii.) To an advowson, one hundred years. (iv.) To tithes, the original grant and the title for thirty years before the contract.

(*t*) Section 7. And subject to certain special provisions in case of ways and watercourses (section 8).

(*u*) But see *Swan* v. *Sinclair*, [1924] 1 Ch. 255.

(*x*) L. P. A., 1925, s. 45, replacing the C. A., 1881.

(*y*) *Ibid.*, but see *Re Wallis and Grout's Contract*, [1906] 2 Ch. 606.

(*z*) L. P. A., 1925, s. 44.

But the abstract should commence with an instrument which forms a good *root of title*, *i.e.*, one which is beyond doubt and does not require the support of outside evidence, *e.g.*, a conveyance in fee on sale; but not a will, as in that case evidence must be given of the testator's title. In some cases, therefore, a vendor may have to go back more than the statutory period (*a*).

A vendor need not necessarily show he has the whole estate if he has a power or an equitable interest which will enable him to procure conveyance. If any other persons are interested in the land, this must be disclosed by the abstract, and their concurrence must be obtained. Thus, if lands are mortgaged, the mortgagee must be paid off out of the purchase-money and join in conveying the legal estate. The expense of such concurrences must be paid by the vendor. On the sale or exchange of land subject to any incumbrance, the Court may allow payment into Court of a sum sufficient to provide for the amount charged on the land with future costs, and may then declare the land free from the charge, and make any order for conveyance or vesting order necessary to give effect to the sale or exchange (*b*).

On mortgage of land, title is investigated in the same way as on sale, the mortgagee requiring a good marketable title, which will enable him, if necessary, to sell again without difficulty.

A contract for sale may be specifically enforced by either the vendor or purchaser, but not a contract to lend or borrow money (*c*).

On a contract to *grant* a lease the lessee has no right to call for the title to the freehold, but on a contract for an *underlease* the lessee can call for the lease and the subsequent or the last thirty years' title thereunder, but not the title to any leasehold reversion (*d*).

On the completion of a sale or mortgage the purchaser or mortgagee is generally entitled to all documents of title relating exclusively to the property. But in the absence of any stipulation to the contrary the vendor is entitled to retain documents of title where (i.) he retains any part of the land to which the

(*a*) *Re Cox and Neve's Contract*, [1891] 2 Ch. 109.

(*b*) L. P. A., 1925, s. 50, replacing C. A., 1881, s. 5 and C. A., 1911, s. 1.

(*c*) Except a contract to take debentures (Companies (Consolidation) Act, 1908, s. 105).

(*d*) L. P. A., 1925, s. 44, replacing C. A., 1881.

documents relate; (ii.) the document is a trust instrument or other instrument creating a trust which is still subsisting or an instrument relating to the appointment or discharge of a trustee of an existing trust; where title deeds cannot be delivered to a purchaser, he is entitled to have a written *acknowledgment* of his right to their production, and to copies thereof (*e*); this acknowledgment imposes on every possessor of the documents, *while they are in his control*, the obligation to produce them whenever required for proving the title of the purchaser; and if the person retaining deeds gives a written *undertaking* for safe custody, as he may be required to do in the absence of any contrary stipulation, that imposes on him an obligation, while he has possession, to keep them safe and undefaced, unless prevented by inevitable accident (*f*).

In Middlesex and Yorkshire search is made in the registries for any registered assurances affecting the lands. Other searches that are, or before 1926 were, necessary in all counties are—for disentailing assurances (before 1926), for writs and orders affecting land and *lites pendentes*, for life annuities (before 1926), for registration of title (*g*), and for deeds of arrangement. In case of copyhold the Court rolls have always been searched and for some time this will still be advisable.

After all searches are made the transaction is completed by conveyance and payment of the consideration money. By the **L. P. A., 1925** (*h*), replacing the C. A., 1881, payment may be made to the vendor's solicitor if he produces a deed having in the body thereof, or indorsed thereon, a receipt, the deed being executed or the indorsed receipt being signed by the vendor.

By the **L. R. A., 1925** (*i*), replacing the Trustee Act, 1893, the receipt of a trustee for money, securities and other personal property payable to him under a trust is a sufficient discharge, and the person so paying, &c., is not bound to see that the money,

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(*e*) L. P. A., 1925, s. 45, replacing C. A., 1881.

(*f*) *Id.*, s. 64, replacing C. A., 1881.

(*g*) *Post*, Chap XXIV. In this case an *official search* may be required to be made, upon which an *official certificate* must be given, which is conclusive in favour of a purchaser or intending purchaser. L. C. A., 1925, ss. 16, 17.

(*h*) Section 69.

(*i*) Section 14.

&c., is duly applied pursuant to the trust. After 1925, this applies notwithstanding anything to the contrary in the trust instrument; but it does not, except where the trustee is a trust corporation, enable a sole trustee to give a valid receipt for money arising under a disposition on trust for sale of land or for capital money arising under the S. L. A. (*k*).

Covenants for Title.—The old warranty has now been superseded by covenants for title entered into by the vendor, for breach of which the remedy is an action for damages. The ordinary covenants are 1. For **right to convey**; 2. For **quiet enjoyment**; 3. For **freedom from incumbrance**; 4. For **further assurance.**

A vendor is entitled to limit his responsibility to the acts of those who have been in possession since the last sale or, if he himself purchased the land, to his own acts only. A mortgagor always covenants absolutely. Trustees covenant merely that they themselves have done no act to incumber the premises.

On conveyance of freeholds the covenants for title are included in the deed of conveyance; but by the **L. P. A., 1925** (*l*), replacing the C. A., 1881, the following (amongst other) covenants are implied in conveyances made after 1881:—

1. In a conveyance for valuable consideration except a mortgage, the four usual covenants by a person who conveys and is expressed to convey as *beneficial owner* limited to his own acts and those through whom he derives title otherwise than as purchaser for value.

2. In a conveyance of leasehold as above, a further covenant (also limited) that the lease is valid, the rent paid, and the covenants performed.

3. On a conveyance by way of mortgage or charge by a person who conveys or charges, &c., absolute covenants for title.

4. On mortgage or charge of leasehold an additional covenant (absolute) for validity of the lease, and for indemnity against the rent, and covenants of the lease, so long as any money remains in the security of the conveyance.

5. On settlement a covenant for further assurance by a person who conveys, &c., as *settlor*, limited to his acts and those of persons claiming under him subsequent to the conveyance.

(*k*) L. P. A., 1925, s. 27; S. L. A., 1925, s. 94. (*l*) Section 76.

6. On any conveyance a covenant (limited to his own acts only) against incumbrances by everyone who conveys as trustee, mortgagee, personal representative of a deceased person, &c.

Formerly, covenants for title were implied in some cases, *e.g.*, from the words "give" or "grant." Now, by the **L. P. A., 1925** (*m*), re-enacting the R. P. A., 1845, such words imply no covenant except where expressly provided by statute.

On a lease for years the word "demise," or other similar words, implies a covenant for quiet enjoyment so long as the lessor, or anyone claiming through him, has any estate in the land (*n*). Usually, however, the lease contains an express covenant by the lessor limited to his own acts only, and such express covenant will nullify the covenant implied from the word "demise."

Present Form of a Conveyance.

THIS INDENTURE made the 2nd day of July 1926 — Date.
BETWEEN A. B. of Cheapside in the City of London Esquire of the one part and C. D. of Lincoln's Inn in the County of Middlesex Esquire of the other part. — Parties.

WITNESSETH that in consideration of the sum of one thousand pounds now paid by the said C. D. to the said A. B. for the purchase of the unincumbered fee simple in possession of the hereditaments hereinafter described (the receipt of which sum the said A. B. doth hereby acknowledge) the said A. B. doth hereby grant *as beneficial owner* unto the said C. D. — Testatum. Consideration. Nature of transaction. Receipt. Operative words.

ALL THAT messuage or tenement [usual description of the property]. — Parcels.

TO HAVE AND TO HOLD the same premises unto and TO THE USE of the said C. D. in fee simple. — Habendum.

IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

The chief respects in which the foregoing differs from a conveyance on sale made before 1882 are (1) The "general words"

(*m*) Section 4. (*n*) *Markham* v. *Paget*, [1908] 1 Ch. 697.

which were formerly inserted after the parcels for the purpose of passing advantages in the nature of easements are no longer necessary (*o*). (2) After the "general words" there was before 1882, where the entire interest of the conveying party was transferred, an *estate clause* for the purpose of passing any estate or interest vested in him and distinct from the estate, &c., which he purported to convey. Now by the L. P. A., 1925 (*p*), every conveyance, unless a contrary intention is expressed, passes all the interest and estate of the person conveying; hence such a clause is unnecessary. (3) Formerly the covenants for title which are now implied by the use of proper statutory words were inserted at length (*q*). (4) A receipt for the consideration was formerly indorsed upon the deed; now by the L. P. A., 1925, a receipt in the body of a deed is a sufficient discharge (*r*).

Forms of Vesting Deed and Trust Instrument on a Settlement of Freehold Lands made after 1925 (*s*).

A. *Vesting Deed.*

THIS VESTING DEED made the 18th day of December 1926 Between A. B. [*the settlor and intended husband*] of [*description*] of the first part C. D. [*the intended wife*] of [*description*] of the second part E. F. [*description*] and G. H. of [*description*] [proposed trustees] (hereinafter called the trustees) of the third part

Witnesseth and it is hereby declared as follows:

1. In consideration of a marriage intended to be solemnised between the said A. B. and C. D. the said A. B. as settlor hereby declares that all and singular [*the parcels*] described in the Schedule hereto are vested in the said A. B. in fee simple upon the trusts declared concerning the same by a trust instrument bearing the same date as but intended to be executed contemporaneously with these presents and made between the same

(*o*) L. P. A., 1925, s. 62, replacing C. A., 1881, s. 6.
(*p*) *Id.*, s. 63, replacing C. A., 1881, s. 63.
(*q*) *Ante*, p. 147.
(*r*) *Id.*, ss. 67, 68, replacing C. A., 1881, ss. 54, 55.
(*s*) *Ante*, pp. 27, 28.

parties and in the same order as these presents or upon such other trusts as the same ought to be held from time to time

2. THE TRUSTEES are the trustees of the settlement effected by these presents and the said trust instrument for all the purposes of the Settled Land Act 1925

3. The following additional or larger powers are conferred by the said trust instrument in relation to the settled land and by virtue of the Settled Land Act 1925 operate and are exercisable as if conferred by that Act on a tenant for life that is to say [*insert here provision dispensing with notice to the trustees* (*t*)].

4. The power of appointing a new trustee or new trustees of the settlement is vested in the said A. B. during his life

IN WITNESS &c.

B. *Trust Instrument.*

THIS TRUST INSTRUMENT is made the 18th day of December 1926 BETWEEN A. B. of [*description*] (hereinafter called the settlor) of the first part C. D. of [*description*] of the second part E. F. of [*description*] and G. H. of [*description*] (hereinafter called the trustees) of the third part

WHEREAS by a deed (hereinafter called the vesting deed) bearing even date with but intended to be executed contemporaneously with these presents and made between the same parties and in the same order as these presents certain hereditaments situate at —— in the county of —— were vested in the said A. B. upon the trusts declared concerning the same by a trust instrument of the same date therein referred to (meaning these presents)

Now in consideration of the intended marriage between the settlor and the said C. D. and in pursuance of an agreement in this behalf entered into upon the treaty for the said intended marriage THIS DEED WITNESSETH as follows:

1. The settlor hereby agrees that he will hold the hereditaments and the property comprised in the vesting deed (hereinafter called the settled land) IN TRUST for himself until the solemnisation of the said marriage and thereafter UPON THE TRUSTS following that is to say

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(*t*) *Antè*, p. 33.

2. Upon trust that the said C. D. shall thenceforth during the joint lives of herself and the settlor receive &c. [*provision for pin money rent-charge*]

3. Upon trust for the settlor during his life without impeachment of waste and after his death

4. Upon trust that if the said C. D. shall survive the settlor the said C. D. shall thenceforth receive &c. [*jointure rent-charge*] and subject thereto

5. Upon trust for the trustees for a term of 1,000 years from the date of the death of the settlor without impeachment of waste upon the trusts hereinafter declared concerning the same And subject to the said term and the trusts thereof

6. Upon trust for the first and every other son of the settlor by the said C. D. severally and successively in remainder one after the other according to seniority in tail male with remainder.

7. Upon trust for the settlor in fee simple

8. And it is hereby agreed and declared &c. [*Here follow the trusts of the term to raise portions*]

9. And it is hereby agreed and declared &c. [*Insert here a provision as to accumulations during minority*]

10. The said E. F. and the said G. H. shall be and they are hereby appointed trustees of these presents for the purposes of the Settled Land Act 1925 and any Act or Acts extending amending or re-enacting the same

In witness &c.

The Schedule above referred to &c.

CHAPTER XXIV.

OF REGISTERED LAND.

The law on this subject is now consolidated by the **Land Registration Act, 1925.**

What may be registered.—Only legal estates in freehold or leasehold (including an underlease) held for a term of years of which more than twenty-one are unexpired. Not a mortgage term so long as there is a subsisting right of redemption (*u*). No entry

(*u*) Sections 2, 3, 4, 8.

other than a caution against dealings with the entirety may be made as respects the title to an undivided share of land, but provisions are made for rectifying the register where there was on January 1, 1926, an existing registration of land held in undivided shares (*x*).

Who may register.—(1) Any *estate owner* (including a tenant for life, statutory owner, P. R., or trustee for sale, but not a mortgagee where there is an existing right of redemption). (2) Any other person (not being a mortgagee, &c., or a person who has merely contracted to buy land) who is entitled to require a legal estate to be vested in him (*y*).

Registration may be with **absolute, possessory,** or **qualified** title.

An **absolute** title to freeholds is registered only if approved of by the registrar. The application must be in manner prescribed by the Rules and must be accompanied by (1) All documents relating to the title which the applicant has in his possession or under his control. (2) A copy or abstract of the latest document of title not being a document of record. (3) Sufficient particulars to enable the land to be identified. (4) A list in triplicate of all documents delivered. If the applicant has no documents of title a statutory declaration of possession by himself and his predecessors may be taken as *primâ facie* evidence of his right. The title is fully examined, except (i.) where the land has been sold or purchased under an order of the Court, or (ii.) it appears to the registrar that the title has been sufficiently investigated in a transaction for value, in which cases the registrar has power to modify the examination; except in certain cases specified in the Rules the application is advertised so as to give an opportunity for objections to be made. The title cannot be registered until any objection is withdrawn or disposed of. The registrar may approve of a *good holding title* or may require the applicant to apply to the Court to sanction the registration.

Incumbrances to which the land is subject and, if the registrar thinks fit, notice of any easement, right or privilege must be entered on the register, and a statutory declaration must be made that they have all been disclosed (*z*). Provisions are also made

(*x*) Section 78. (*y*) Sections 4, 8. (*z*) Section 14.

for the stamping and marking of the documents of title so that the registration cannot be concealed (*a*).

On application for registration of an absolute title, if the title can be established only for a limited time, or subject to reservations, it may be registered as a **qualified** title, which is the same as an absolute title, save that it is subject to any such right, title, or interest which is excepted from the registration (*b*).

A **possessory** title, which is all that need be registered even where registration is necessary, is registered without any examination of title or advertisement of the application; the same documents must be produced as on application for registration with absolute title, but it is sufficient if they afford *primâ facie* evidence of the applicant's right; in this case also, as well as upon registration of an absolute or qualified title, provisions exist as to the marking of documents of title and the entry on the register of incumbrances, easements, &c. (*c*). If on an application for registration with a possessory title the registrar is satisfied as to the title to the freehold estate, he may register it as absolute whether or not the applicant consents (*d*).

Leaseholds.—The same rules in general apply. The lease or an abstract thereof or other evidence of its contents must be produced; and if an absolute title is required, the title to the freehold and any intermediate leasehold must also be approved; leasehold land held under a lease containing an absolute prohibition against dealings therewith cannot be registered, and if held under a lease containing restrictions on such dealings it cannot be registered unless provision is made for preventing dealings in contravention of such restrictions (*e*).

On entry of a person's name, a **land certificate** is prepared stating the title registered, and may be delivered to him or deposited in the registry.

The effect of first registration of a person with an **absolute** title in case of **freeholds** confers on him an absolute estate in fee simple, subject (i.) to any incumbrances and other entries on the register, and (ii.) unless the contrary is expressed, to such

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(*a*) Section 16.
(*b*) Section 7.
(*c*) Sections 4, 16.
(*d*) Section 4.
(*e*) Sections 8, 12.

overriding interests (*f*), if any, as affect the registered land, and (iii.) where the first proprietor is not entitled for his own benefit as between himself and the persons entitled to *minor interests* (*g*), to any minor interests of such persons, but free from all other estates and interests, including those of the Crown (*h*).

Registration with a **qualified** title has the same effect save that excepted interests are not affected; registration with a **possessory** title does not affect any adverse estate or interest subsisting or capable of arising at the date of registration (*i*).

The registration of a person as first proprietor of **leasehold** with an **absolute title** vests in him the possession of the leasehold interest with all implied or expressed rights, appurtenances, &c., but subject (i.) to all implied and expressed covenants, obligations and liabilities; and (ii.) to any incumbrances and other entries on the register; and (iii.) unless the contrary is expressed on the register to any overriding interests; and (iv.) to minor interests as in the case of freehold, but free from all other estates and interests (*k*).

The effect of a first registration with a *good leasehold*, **qualified** or **possessory** title is substantially the same as in the case of freehold (*l*).

In certain circumstances land which has been registered with a possessory title may be subsequently registered with an absolute or good leasehold title (*m*).

A tenant for life having the power of sale given by the S. L. A.,

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(*f*) *I.e.*, all the incumbrances, interests, rights, &c., *not* entered on the register, but subject to which registered dispositions are by the L. P. A., 1925, to take effect (section 70).

(*g*) *I.e.*, the interests not capable of being disposed of or created by registered dispositions and capable of being overridden (whether or not a purchaser has notice thereof) by the proprietors, unless protected by the Act, and all rights and interests which are not registered or protected by the register and are not overriding interests, and including (a) in the case of land held on trust for sale, all interests, &c., which under the L. P. A., 1925, are capable of being overridden by the trustees for sale, and (b) in the case of settled land, all interests &c., which, under the S. L. A., 1925, or the L. P. A., 1925, are capable of being overridden by the tenant for life or statutory owner.

(*h*) Section 5.

(*i*) Sections 6, 7.

(*k*) Section 9.

(*l*) Sections 10-12.

(*m*) Section 77.

1925, may apply for registration, and settled land must be registered in the name of the tenant for life or statutory owner; the successive or other interests created by or arising under the settlement (except any legal estate which cannot be overridden) take effect only as *minor interests*; any restrictions necessary for protecting the persons beneficially interested in the land must be entered on the register (*n*).

Transfers.—The registered proprietor may transfer the registered estate in the land or any part thereof and in case of *freeholds* may, subject to any entry to the contrary on the register (i.) transfer the fee simple in possession of mines or minerals apart from the surface or *vice versâ*; (ii.) grant an annuity or rent-charge in possession; (iii.) grant in fee simple in possession any easement or privilege; (iv.) transfer the fee simple in possession subject to any annuity, rent-charge, easement or privilege in possession; (v.) grant a lease of the land, or of mines, &c., without the surface, or *vice versâ*; the registered proprietor of leaseholds has similar rights (*o*).

The transfer must be completed by entry on the register of the transferee or chargee, and until entry the transferor remains proprietor; and all interests transferred or created by disposition by the proprietor, other than a transfer of the registered estate must, subject to certain qualifications, be similarly completed by registration and the disposition takes effect as a *registered disposition* (*p*).

The estate for the time being vested in the registered proprietor is only capable of being disposed of or dealt with by him in the manner authorised by the Act (*q*), and where any transaction is capable of being effected and is effected by a registered disposition, then (subject to exceptions) any other deed or instrument is void so far as the transaction is carried out by a registered disposition (*r*); where the dealing is not capable of registration it may be effected as if the land were not registered, but subject to exceptions any interest created takes effect only as a minor interest (*s*).

Where the title is *absolute* a registered disposition confers on the transferee the legal estate expressed to be dealt with, with all

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(*n*) Section 86. (*o*) Section 21. (*p*) Section 19.
(*q*) Section 69. (*r*) Section 39. (*s*) Sections 101, 103, 104.

rights, &c., belonging thereto, subject to (i.) any incumbrances and other interests appearing on the register; (ii.) any overriding interests; and (iii.) (in the case of leaseholds) all implied or express covenants, obligations, &c.; where the title is qualified, the transfer does not affect any excepted interests, and where it is possessory it does not affect any rights and interests adverse to or in derogation of the title of the first registered proprietor and subsisting or capable of arising at the time of the registration of such proprietor; a registered transfer of freeholds made without valuable consideration is also subject to *minor interests* (*t*).

On every entry of a disposition by the registered proprietor the land certificate must be indorsed accordingly (*u*).

Registered charges.—The registered proprietor may either mortgage the land as if it were not registered or give a registered charge thereon. A charge must be by deed and is completed by the entry on the register of the person in whose favour it is made and the particulars of the charge; unless made by way of demise or sub-demise and subject to any contrary provision therein contained it will take effect as a charge by way of legal mortgage (*x*). When such a charge is created, there are implied, in the absence of any contrary entry on the register, *covenants* by the chargor to pay the principal and interest and, in the case of leaseholds, to pay the rent and perform the other covenants and conditions of the lease and to indemnify the covenantee against the same (*y*). On completion of a registered charge a *certificate of charge* is given to the proprietor of the charge (*z*).

Subject to any entry on the register to the contrary the proprietor of a charge has all the powers conferred by law on the owner of a legal mortgage, *e.g.*, right of entry, right of foreclosure and right to sell (*a*). Subject to any contrary entry registered charges rank according to the order in which they are entered (*b*).

Transfers of a registered charge are made by instrument of transfer in prescribed form and are not complete until entry (*c*).

The **cessation** of a registered charge must be notified on the register, at the requisition of the registered proprietor, or on due

(*t*) Section 20.
(*x*) Sections 25-27.
(*z*) Section 63.
(*b*) Section 29.
(*u*) Section 64.
(*y*) Sections 21, 28.
(*a*) Section 34.
(*c*) Section 33.

proof of the satisfaction thereof, and thereupon the charge ceases (*d*).

The registered proprietor of any registered land or charge may, subject to any overriding interest, to any contrary entry on the register, and to any registered estates, charges or liens, create a lien on the land or charge by deposit of the land certificate or certificate of charge, and such lien will be equivalent to a lien created by the deposit of title deeds or of a mortgage deed of unregistered land by an owner entitled for its own benefit to the registered estate or by a mortgagee beneficially entitled to the mortgage (*e*).

Subject to any contrary entry on the register a registered proprietor may **mortgage** land as if it were not registered but, unless and until protected by a **caution** it takes effect in equity only, and may be overridden as a *minor interest*; when a mortgage by deed has been protected by caution the mortgagee may require it to be registered as a charge, and he will then have the same powers as the proprietor of a registered charge (*f*).

A person entitled to an incumbrance prior to the first registration may be registered as the proprietor of such incumbrance, and a **certificate of incumbrance** is issued to him, and he can create a sub-charge on such incumbrance.

On death of a sole proprietor his P. R. are entitled to be registered (*g*). On bankruptcy the official receiver or trustee or his transferee may be registered (*h*); as soon as possible after registration of a petition in bankruptcy the registrar must issue a *creditor's notice* (*i*) against the title of any proprietor of any registered land or charge which appears to be affected, and such notice protects the rights of all creditors and unless cancelled remains in force until the trustee in bankruptcy is registered as proprietor or a **bankruptcy inhibition** is registered. The latter must be registered as soon as practicable after the registration of a receiving order, and thereafter no dealing affecting the registered land or charge, other than the registration of the trustee in bankruptcy, shall be entered on the register. Where a purchaser

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(*d*) Section 35.
(*e*) Section 66.
(*f*) Section 106.
(*g*) Section 41.
(*h*) Section 42.
(*i*) Section 61.

for value in good faith is registered as proprietor of an estate or charge his title is good as against the trustee in bankruptcy unless at the date of the disposition either a creditor's notice or bankruptcy inhibition has been registered, but if at the date of the disposition the purchaser has notice of an available act of bankruptcy or of the receiving order or of the adjudication, he will not be deemed to take in good faith.

The P. R. of a deceased proprietor may, without being himself registered, transfer any registered land or charge of which the deceased was registered proprietor or dispose of it by way of assent or appropriation or vesting assent.

Neither the registrar or any person dealing with registered land or a charge shall be affected with notice of a trust (*k*).

Evidence of title.—On any disposition of land except to a lessee or chargee the vendor, notwithstanding any contrary stipulation, must at his own expense furnish the purchaser with authority to inspect the register and, if required, with a copy of the subsisting entries in the register and of any filed plans, abstracts, &c., noted on the register so far as they affect the land to be dealt with (except charges and incumbrances registered or protected on the register which are to be discharged or overridden) ; he must also, subject to any contrary stipulation, at his own expense furnish such copies, abstracts and evidence (if any) in respect of any subsisting rights and interests as to which the register is not conclusive, and of any matters excepted from registration as the purchaser would have been entitled to if the land had not been registered; save as aforesaid he need not furnish any abstract or other written evidence of title or any copy or abstract of the land certificate or any charge certificate ; any reference in the register to a filed abstract or copy, &c. of any document must be deemed to be correct and to contain all material parts of the original, and no one dealing with any registered land or charge has a right to require production of the original or is bound by any provisions of the document not appearing in such abstract copy, &c. (*l*).

Where the vendor of registered land is not himself registered as proprietor of the land or of a charge giving a power of sale over

(*k*) Section 74. (*l*) Section 110.

the land he must, at the request of the purchaser and at his own expense, either procure registration of himself or procure a transfer from the registered proprietor to the purchaser; upon completion, unless the certificate is deposited at the registry, he must deliver the land certificate or charge certificate to the purchaser or, if only part of the land is sold, produce or procure the production of the certificate (*m*).

Instruments or applications delivered for registration take effect from the time of delivery. But a **priority notice** may be lodged reserving priority for a specified instrument or application to be subsequently made, which if delivered within fourteen days has priority from the date of the notice. Upon the joint application in writing of the proprietor and an intended purchaser the latter may be registered provisionally as proprietor.

Subject to any contrary entry on the register, and without prejudice to the rights of persons entitled to any overriding interests and to any encumbrances entered on the register, who may not concur therein, the proprietor may in any registered disposition or other instrument impose any obligation or reservation with respect to the user of the registered land, or waive any rights arising from any covenant or condition, or release any such obligation or reservation; entries must be made in the register of any such obligation, reservation, waiver or release (*n*).

Notices, Cautions, Inhibitions and Restrictions.—Any lessee or person entitled to or interested in a lease or an agreement for a lease of registered land, where the term granted is not an overriding interest (*ante*, p. 154) may apply for registration of **notice** of the lease or agreement, and upon registration every registered proprietor of the land and every person deriving title through him will have notice of such lease, &c., but a proprietor of a charge or incumbrance previously registered or protected will not have notice unless he is bound by the terms of the lease; such notice, unless the lease is binding on the proprietor of the land, cannot be registered without his consent except by order of the Court (*o*).

These provisions as to notice extend to notices of or claims in respect of (i.) grants or reservations of annuities or rent-charges in possession; (ii.) severance of mines and minerals unless

(*m*) Section 110. (*n*) Section 40. (*o*) Section 48.

expressly included in the registration; (iii.) land charges until registered as such; (iv.) the right of any person interested in the proceeds of land held on trust for sale or in settled land to require that (unless a trust corporation is acting as trustee) there shall be at least two trustees of the disposition on trust for sale or of the settlement; (v.) rights in respect of dower or freebench taking effect in equity as minor interests; (vi.) creditors' notices and any other right, interest or claim which it is expedient to protect by notice instead of by caution, inhibition or restriction. But no notice can be registered in respect of any estate, right, &c., which (independently of the L. R. A.) is capable of being overridden and protected by a restriction; a notice registered in respect of a right, interest, &c., does not prejudicially affect (i.) the powers of disposition of the P. R. of the person under whose will or intestacy such right, &c., arose; (ii.) the powers of disposition (independently of the L. R. A.) of a proprietor holding on trust for sale (*p*).

Notice of a restrictive covenant may be registered and the proprietor of the land and persons deriving title under him, except incumbrancers and persons not bound by the covenant when notice is registered, will have notice of such covenant (*q*).

Any person interested in any land or charge registered in the name of any other person may lodge with the registrar a **caution** which prevents the registration of any dealings with such land until notice has been served on the cautioner by the registrar (*r*). A caution may also be served in respect of unregistered land to prevent its registration (*s*).

An **inhibition** is an order or entry made by the registrar or the Court upon the application of a person interested in any registered land or charge and forbidding until the occurrence of a specified event, or until further order, any dealings with such land or charge (*t*).

A **restriction** is an entry made on the application of a registered proprietor forbidding any transfers or charges until certain specified conditions are complied with (*u*).

(*p*) Section 49.
(*q*) Section 50.
(*r*) Section 55.
(*s*) Section 53.
(*t*) Section 57.
(*u*) Section 58.

Subject to certain provisions of the Act relating to fraud and to the title of a trustee in bankruptcy, a purchaser acquiring a title under a registered disposition is not concerned with any pending action, writ, order, deed of arrangement, or other document, matter or claim, not being an overriding interest, which is not protected by a caution or other entry on the register, whether he has or has not express or constructive notice thereof (*x*).

The Act contains provisions for **rectification of the register** (by the Court, or by the registrar subject to appeal by the Court) in certain specified cases (*y*) and for the payment of **indemnity** to persons suffering loss by erroneous entries on the register (*z*), and where the land is not situated in an area where registration is compulsory, or where the entirety is not registered, for its **removal from the register** (*a*).

(*x*) Section 61.

(*y*) Section 114.

(*z*) Section 83.

(*a*) Section 81. If the land so removed is within the jurisdiction of the Middlesex or Yorkshire registries it will then again become subject to such jurisdiction.

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Suggested Course of Reading for the Bar Examinations.

ROMAN LAW.
HUNTER'S Introduction or KELKE'S Primer. SANDARS' Justinian. For final revision, GARSIA'S Roman Law in a Nutshell.

CONSTITUTIONAL LAW AND LEGAL HISTORY.
CHALMERS & ASQUITH. THOMAS'S Leading Cases. POTTER'S Legal History, or HAMMOND'S Legal History. For final revision, GARSIA'S Constitutional Law and Legal History in a Nutshell.

CRIMINAL LAW AND PROCEDURE.
ODGERS' Common Law, or WILSHERE'S Criminal Law, and WILSHERE'S Leading Cases. For final revision, GARSIA'S Criminal Law in a Nutshell.

REAL PROPERTY.
WILLIAMS (with WILSHERE'S Analysis), or EDWARDS. For revision. GARSIA'S Real Property and Conveyancing in a Nutshell.

CONVEYANCING.
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